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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

No. _____

ORVILLE AMBURGEY,

Petitioner,

vs.

THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS A. KATHE, City Attorney for the City of Costa Mesa, an individual; ALLAN ROEDER, City Manager for the City of Costa Mesa, an individual; MARY HORNBUCKLE, an individual; and DOES 1-100, inclusive.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERITORARI

LAW OFFICES OF
LAWRENCE K. HARVEY
2103 Valley Road
Costa Mesa, CA 92627
714/650-0797

123 pp

QUESTIONS PRESENTED FOR REVIEW

1) Whether a City Attorney is entitled to absolute prosecutorial immunity for supervision of and participation in a six month long pre-arrest investigation?

2) Whether a City Attorney who makes an out of court public statement in which he falsely asserts that the Petitioner is guilty and charged with a felony offense, misrepresents evidence to the District Attorney and releases this false information to the press, is protected by absolute prosecutorial immunity against civil liability?

3) Whether City Council Members who conspire with the City Attorney to manufacture false evidence which inculpates the Petitioner, and who likewise make out of court statements in furtherance of this conspiracy, are entitled to absolute legislative immunity?

4) Whether the City Attorney and the Petitioner, a City Council Member, have an Attorney-Client relationship?

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OPINIONS BELOW

The Supreme Court of California declined to hear this case on March 21, 1994; no opinion, official or unofficial, exists. The unpublished written opinion of the Court of Appeal for the State of California Fourth Appellate District, Third Division, appears in Appendix A to this Petition. Petitioner's appellant brief appears in Appendix B to this Petition. Petitioner's appellant reply brief appears in Appendix C to this Petition. The Official Statements of Decision of the Orange County Superior Court appear in Appendix D to this Petition. Petitioner's Proposed Second Amended Complaint appears in Appendix E to this Petition.

JURISDICTION

The Supreme Court of California declined to hear this case on March 21,1994. This timely Petition is filed under the jurisdiction of Title 28, U.S.C. § 1257.

STATUTORY PROVISIONS

Any and all United States Statues and references to the California Government Code will be cited in the text of this Petition.

STATEMENT OF THE CASE

In June of 1990, Orville Amburgey, Petitioner herein, was an elected City Council Member for the City of Costa Mesa, California. Petitioner had held the paid position of City Council Member for four years.

A closed session of the City Council was held in September of 1990 to discuss the performance evaluation of Respondent, City Attorney Thomas Kathe. Four members of the City Council were present. Respondent Kathe's probationary term of employment had ended, making it necessary for the City Council to decide whether to terminate or continue his employment. During this meeting, Petitioner voted to terminate Respondent Kathe for reasons of incompetence, and voted against a salary increase for Respondent Kathe. Petitioner made his reasons for voting against Respondent Kathe known to the other present City Council Members. However, because a majority of the entire City Council was not present for voting, the results were not valid.

At the next City Council meeting one week later, the City Clerk stated that the vote needed to be repeated by the majority to be valid. Because this meeting was an open session, Respondent Kathe was present during the voting on his employment and salary increase. Petitioner again voted to

terminate the employment and against the salary increase. This incident began a series of actions taken by Respondent Kathe which were intended to remove Petitioner from the City Council.

Additionally, Petitioner was politically opposed to Respondent Hornbuckle on many issues which divided the City Council. Respondent Hornbuckle, and her coalition of fellow City Council Members, constantly attempted to overrule the vote of Petitioner. Respondent Hornbuckle wished to remove Petitioner from the City Council so her issues could pass through the City Council easier. Respondent Hornbuckle became involved with Respondent Kathe's scheme to remove Petitioner from office through her access to information and private meetings with Respondent Kathe.

Respondent Roeder became involved with the conspiracy through his meetings with Respondents Kathe and Hornbuckle, and also through an official report which he manufactured and gave to Respondent Kathe as evidence.

The Respondents knew that the easiest way to remove Petitioner from office would be to ensure that he would not be re-elected for another term. The Respondents used Petitioner's source of outside income as a tool to invent an alleged conflict of

interest for Petitioner.

Petitioner owned an electric contracting company, which he operated in addition to fulfilling his duties as a City Council Member. His electric company, Amburgey Electric, performed contracting work for Copley Colony, the city's cable contractor.

In October of 1990, Petitioner was involved in a heated re-election campaign to retain his council position for another term. Shortly before the general election, Petitioner learned that a local newspaper had requested copies of Copley Colony invoices which involved Amburgey Electric. Petitioner then contacted the newspaper and advised the newspaper that he would provide any information which was requested. The newspaper made no further contact with him regarding the invoices.

Six days prior to the general election, Respondents Hornbuckle, Kathe, and Roeder released information to the press alleging that Petitioner had committed a felony while acting as a City Council Member. Respondent Hornbuckle specifically told the press that Respondent Kathe had filed charges against Petitioner with the District Attorney, which in turn filed a criminal complaint against Petitioner for an alleged conflict of interest in violation of

California Government Code sections 87100[1], 87103[2] and Political Reform Act section 91000[3]. The basis of the complaint was an alleged conflict of interest between Petitioner and Copley Colony, the city's cable contractor. All three of the major newspapers, including the newspaper which inquired about the invoices, printed articles relating the allegations against Petitioner.

In letters to the District Attorney's Office, Respondent Kathe outlined an investigation that he conducted from May to October which he claimed showed that Petitioner had voted on the cable television contract while maintaining a financial interest in

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[1] Section 87100 provides in part: "No public official. . . shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

[2] Section 87103 states in part: "An official has a financial interest in a decision. . . if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family. . . ."

[3] Under section 91000, a violation of the Political Reform Act is prosecuted as a misdemeanor.

the franchise company. Respondent Kathe based his allegations on a review of city documents, interviews of witnesses, and a review of public records. The District Attorney did not know that Respondents Kathe and Roeder had manufactured documents to support the case against Petitioner.

On May 30, 1990, Council Member Ed Glasgow asked Respondent Kathe to review the purchasing procedures on the contracts involving the City of Costa Mesa. Respondent Kathe subsequently send a memorandum via Respondent Roeder to all department heads requesting copies of all contracts for the past three years. Although the contract involving Petitioner's business was four years old, Respondent Kathe used the request from Council Member Ed Glasgow as a pretext to particularly look for alleged evidence against Petitioner. Respondent Kathe's investigation into Petitioner's alleged wrongdoing began in May, but Respondent Kathe delayed pursuing this information until he released the report on October 31, 1990, five months later.

Although the report from Respondent Kathe referenced several issues of apparent misconduct throughout the city, only the matter involving Petitioner was pursued. The matter involving Petitioner was discussed in open session of the City Council

meetings, while all other matters of apparent misconduct were discussed in closed session meetings and dismissed.

The City Attorney's office produced a supposedly confidential report outlining the issues of apparent misconduct, not to be released to the City Council until November 3, 1990. Respondent Roeder told one of the newspapers that the report was not finished and therefore not available. However, Respondent Hornbuckle was given access to this information before the City Council, and before Petitioner. The only persons who had access to this information and could have forwarded it to Respondent Hornbuckle were Respondents Kathe and Roeder. She knew that the specific allegations against Petitioner involved a June 1987 City Council meeting in which the Copley Colony cable contract was discussed. However, at this City Council meeting in June of 1987, no vote was taken regarding modification of the contract.

The October 31, 1990 memorandum to the City Council from the City Attorney's office regarding the review of contracts opened with the statement that Respondent Hornbuckle on October 30 had asked for an explanation of the alleged misconduct report. This memorandum was written to the City Council the same day that the articles damaging to Petitioner appeared in the

three major newspapers, but the memorandum was not delivered to the City Council until November 3. The fact that Respondent Hornbuckle was asking for an explanation of the report shows that she had access to the information contained in the report prior to all other Members of the City Council, including Petitioner.

Respondents Hornbuckle and Roeder assisted Respondent Kathe in conducting his investigation; these individuals met on several occasions to discuss the progress of the investigation, including which avenues to pursue in developing evidence to substantiate the charges against Petitioner.

Petitioner was never questioned nor advised as to the investigation or the conclusions reached by the Respondents until he was contacted by the newspapers six days before the election. Once he learned of the allegations, Petitioner conducted his own investigation and learned that the accusations were entirely without merit. Petitioner obtained a copy of the minutes of the June 1987 City Council meeting in question, which discuss only the recommendation by Respondent Roeder to the City Council to approve the modification of the agreement with Copley Colony; there is no vote regarding the Copley Colony contract. Petitioner also obtained a tape recorded copy of the meeting from

independent parties known by City Officials to tape report all City Council meetings. Respondent Roeder was aware, or should have been aware of the practice of tape recording the meetings. This recorded copy of the minutes likewise reveals that there was no vote taken to modify the contract. At this meeting the City Council approved the performance evaluation of Copley Colony, which gave Copley Colony and Amburgey Electric no advantage and was not in violation of any statute or laws.

In June of 1989, Respondent Roeder prepared a modified cable contract agreement and falsely stated that the City Council had voted and approved the modification. The City Council was advised to accept the modification, but no vote was taken at the June 1987 meeting; the request for modification was expressly excluded from the vote. Respondent Roeder was present at this meeting, and knew or should have known the true facts when he prepared the report.

On September 12, 1990, Respondent Kathe met with Respondent Roeder to advise Roeder of the investigation into the alleged conflict of interest. Respondent Kathe advised Respondent Roeder that if there was evidence of a conflict of interest, Roeder should do the following: notify Petitioner and Copley Colony of the

possible violation; notify the City Council and obtain permission to conduct an investigation; and refer the matter to the police department for investigation. None of these three steps was taken.

Instead of following his own recommendations, Respondent Kathe continued to investigate and subsequently took the file to the District Attorney for an additional confidential investigation. Respondent Kathe did all investigation and initiation. He did not contact the Costa Mesa Police Department, the investigative arm of the city, until the day prior to meeting the District Attorney. He took the Chief of Police to the District Attorney's office and implied during the meeting that the police had done an investigation. The Police Department has stated that it never conducted or was advised to any investigation until that day. The District Attorney was given the council meeting minutes, and a copy of the falsified document manufactured by Respondent Roeder. The District Attorney's office filed a compliant based on the information it was given. A complaint was entered for the arrest of Petitioner, and Petitioner was summoned to court. Petitioner was later released on his own recognizance.

The District Attorney was still working on the file as the

election neared, but Respondents Kathe and Hornbuckle released the information to the press despite the fact that this was a confidential investigation. Respondent Kathe had possession of the City Council meeting minutes in question, and knew or should have known that no vote was taken at the meeting, yet he deliberately misrepresented the information. He knowingly used manufactured evidence and forwarded this falsified evidence to both the District Attorney and the press.

Further, Respondent Kathe went to the District Attorney on the same day that a City Council meeting was held. He did not inform the City Council majority at the meeting, as is required by the municipal code. He notified the City Council members individually because there was no closed session or open session with the matter on the agenda, in violation of the Brown Act.[4] Petitioner and City Council Member Glasgow were not advised at any time, nor was the matter agendized.

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[4] California Government Code § 54950 et. seq. (Brown Act) provides in part that all matters must be placed on the agenda to be discussed at the meetings, or that the matter shall be discussed in closed session, after giving at least 72 hours notice to those expected to be present.

Petitioner presented his evidence in May of 1991, when the complaint against him was filed to the District Attorney, who then agreed to dismiss the case. All charges against him were dropped, but the actions of the Respondents could not be rescinded.

During Petitioner's investigation, he learned that Respondent Roeder had manufactured official city documents and reports that were inaccurate, which were used by Respondents Kathe and Hornbuckle to substantiate their position. Petitioner learned that the Respondents, in the manner of their actions, wanted to unseat Petitioner from the City Council and thus were motivated to release the unsubstantiated allegations without offering him any due process or an opportunity to rebut the allegations. As a result, Petitioner lost the election and was replaced on the City Council.

Two weeks before the election, a poll indicated that Petitioner was winning the election by a large margin. In 1986, Petitioner won the election by a landslide. As a result of the Respondents' actions, Petitioner finished fourth of five candidates. Respondent Kathe admits that his office conducted an investigation and continues to refuse to rectify or admit any wrongdoing.

Upon dismissal of the complaint by the District Attorney, Petitioner asked for a reimbursement of attorney's fees of approximately $14,000 to defend the criminal action. Even though authorized by statute to reimburse a City Officer that has been sued in a civil action or charged in a criminal action, the City Council refused to authorize payment.[5]

On September 23, 1991, Petitioner filed a complaint against the Respondents for a deprivation of civil rights, legal malpractice, breach of fiduciary duty, conspiracy and other related counts. On February 26, 1992, the court sustained the Respondents' demurrer to the complaint.

On March 23, 1992, Petitioner filed an amended complaint alleging the same causes of action with a different statement of facts. On June 3, 1992, the court sustained the Respondents' demurrer to the amended complaint without leave to amend. The court found that Petitioner's civil rights cause of action failed to allege violation of a federally protected right, and that the

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[5] California Government Code § 996.4 provides that a City Official is entitled to reimbursement of reasonable legal fees used to provide a defense in a civil action or a criminal action.

Respondents were entitled to absolute immunity. Furthermore, the court found that Petitioner and Respondent Kathe did not have an attorney-client relationship.

On June 16, 1992, Petitioner filed a motion for reconsideration with a proposed second amended complaint. On September 23, 1992, the court reconsidered its prior ruling and the proposed complaint and ordered that the original ruling was to stand, finding that Petitioner failed to state a cause of action.

On September 30, 1992, Petitioner filed an appeal with the Court of Appeal for the State of California, Fourth Appellate District. On November 18, 1993, the Court of Appeal, in its opinion[6], affirmed the trial court's judgment, which sustained the Respondents' demurrer to the amended complaint without leave to amend. The court stated that although an order sustaining the demurrer without leave is not appealable (Code Civ. Proc., § 904.1)[7], in the interests of justice and to prevent unnecessary

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[6] Hereinafter, all references to the California Fourth District Court of Appeal will be cited as (opinion,) with the page number noted in the citation.

[7] Section 904.1 provides that an order sustaining the demurrer without leave to amend is not appealable.

delay it deemed the order sustaining the demurrer to incorporate the judgment and treated the notice of appeal as being taken therefrom (opinion, 2 nt.1).

On December 2, 1993, Petitioner filed a petition for rehearing on the issue of filing the proposed second amended complaint. The petition was denied on December 16, 1993.

On December 27, 1993, Petitioner filed a petition for review by the California Supreme Court. The California Supreme Court declined to hear the case on March 21, 1994. Petitioner then filed this petition for writ of certiorari to the California Supreme Court.

ARGUMENT

Through its decision in Burns v. Reed, 500 U.S. ____ (1990) this Court has recognized the need to redefine the scope of absolute prosecutorial immunity, particularly in the area of investigative prosecutorial acts, in light of the added protection afforded government officials by Harlow v. Fitzgerald, 47 U.S. 800 (1982) and its progeny. The importance of these issues is highlighted by the fact that they arise here in a politically significant case, which implicates questions concerning improper conduct by the city officials of the City of Costa Mesa, and the wrongful accusations and charge of an innocent man.

The lower court's decision refuses to follow Burns, relies heavily on an expansive view of Imbler v. Pachtman, 424 U.S. 409 (1975), and expands the scope of absolute prosecutorial immunity in a way which is contrary to Harlow v. Fitzgerald and its progeny, including the recent decision in Buckley v. Fitzsimmons, 93 D.A.R. 7961 (1993). This Court held in Burns that the expanded scope of qualified immunity, as first established in the post-Imbler decision of Harlow v. Fitzgerald, requires a narrowing of these absolute immunities, as well as the scope of Imbler itself:

> The qualified immunity standard is today more protective of officials that it was at the time that Imbler was decided. 'As the qualified immunity defense has evolved, it provides ample support to all but the plainly incompetent or those who knowingly violate the law.' Malley v. Briggs, 475 U.S., 335 (1986); see also Mitchell v. Forsyth, 472 U.S., 511, 524 (1985).
>
> In Harlow v. Fitzgerald, we 'completely reformulated qualified immunity,' Anderson v. Creighton, 483 U.S. 619 (1987), replacing the common law subjective standard with an objective standard that allows liability only where the official violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.' Harlow, *supra*, 457 U.S., at 818. This change was specifically designed to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and we believe it sufficiently serves that goal," Malley, *supra*, 475 U.S., at 341 (1986); see also Mitchell v. Forsyth, *supra*, 472 U.S. 511, 524 (1985).

> Accordingly, it satisfies one of the principal concerns underlying our recognition of absolute immunity. See, e.g. Imbler, *supra*, 424 U.S. at 419 (further citation omitted).

Burns v. Reed, *supra*, 111 S.Ct. at 1944, 1944 nt. 8.

In the concurring opinion of Burns, the Justices went further, noting the historical and legal errors of the Imbler opinion, in particular the complete lack of common law precedent for prosecutorial immunity for any out of court acts, and raising serious questions concerning the continued vitality of Imbler in circumstances which extend beyond actual in-court conduct, 111 S.Ct. at 1945, 1949.

This Court went beyond Burns in Buckley v. Fitzsimmons, *supra*, 93 D.A.R. 7961 (1993). In Buckley, this Court stated that

> "there is no common-law immunity for prosecutor's out-of-court statements to the press, and, under Imbler, such comments have no functional tie to the judicial process just because they are made by a prosecutor. Nor do policy considerations support extending absolute immunity to press statements, since this Court has no license to establish immunities from § 1983 actions in the interest of what it judges to be sound public policy, and since the presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties."

Buckley v. Fitzsimmons, *supra*, 93 D.A.R. 7961 (1993). Although the Buckley case involved a conspiracy by prosecutors and law

enforcement officials against a criminal Respondent, it is comparable here to the conspiracy by city officials against Petitioner.

I. THE CALIFORNIA SUPREME COURT'S REFUSAL TO HEAR THIS CASE, SUSTAINING THE APPELLATE COURT'S EXTENSION OF ABSOLUTE PROSECUTORIAL IMMUNITY TO CLEARLY INVESTIGATIVE ACTS IS IN CONFLICT WITH THIS COURT'S DECISION IN BURNS, AND WITH NUMEROUS DECISIONS IN THE MAJORITY OF THE COURTS OF APPEALS; IS INCONSISTENT WITH THE FUNCTIONAL APPROACH ARTICULATED BY THIS COURT IN BUTZ AND FORRESTER; AND IS AN UNWARRANTED EXTENSION OF IMBLER.

Petitioner alleges in his complaint that the Respondent city officials, in conspiracy with each other, performed numerous investigative acts, some of which predated any judicial proceedings by almost a year. These acts included manufacturing official city documents, and deliberate misrepresentation of facts to the District Attorney, the press and the public. Petitioner further alleges that these city officials performed other investigative functions in conspiracy with each other, by meeting to discuss further actions to be taken against Petitioner, by misrepresenting the facts to the District Attorney, by soliciting statements from electrical inspectors and other officials against Petitioner, and by failing to inform the police department until the day before the

scheduled meeting with the District Attorney. [paragraphs 6, 8, 9, 10, 11, 13, 14] The Petitioner also alleges that these investigative acts deprived him of his civil rights.

This Court's decision in Burns clearly established that the conduct and acts of the prosecutors in Buckley in interrogating witnesses and obtaining and/or manufacturing evidence is investigative. Here, the conduct of the city officials in soliciting statements from witnesses and obtaining and/or manufacturing the report is investigative under Burns and Buckley. In Burns the manufactured evidence was a hypnotized "confession", and in Buckley the manufactured evidence was a falsified bootprint at a crime scene; here it is the manufactured report of the City Council vote. If giving advice concerning such acts is investigative, as this Court held in Burns, it is clear that the acts themselves are also investigative and therefore not entitled to absolute immunity.

There is a factual similarity between the three cases. All of the men were charged, but none were convicted. Burn's and Petitioner's charges were dropped before trial, Buckley's after. None sought damages from the officials for the investigation itself. In each instance the interrogations and manufactured evidence played a crucial role in obtaining a probable cause determination,

and therefore in their injuries. The Burns decision supports Petitioner's position that these prosecutorial acts are investigative, and that the timing and locus of the injury does not effect that determination.

In Buckley, the prosecutors committed non-immunized investigative acts in furtherance of the conspiracy, which continued with the same actions by the police and others. In Petitioner's case, the Respondent City Officials committed non-immunized investigative acts in furtherance of the conspiracy, which continued with their additional acts. This continuation of the conspiracy caused the false information to be forwarded to the District Attorney, who filed charges against Petitioner. Although this Court in Imbler did not decide whether absolute immunity should extend to "those aspects of the prosecutor's responsibility that cast him in the role of an investigative officer rather than of an advocate" (Imbler v. Pachtman, *supra*, at pp. 430-431), that decision was articulated in the Burns and Buckley cases. That decision was also articulated in Briggs v. Stafford/Goodwin, 569 F.2d 10 (D.C. Cir 1977), where the court granted only a qualified immunity to prosecutors acting in an investigative capacity.

Petitioner's allegations are that these acts are clearly

investigative acts by Respondents. Most obviously investigative are obtaining statements and searching for official documents to support the position. The lower court's holding, that these acts are not investigative, and its rationale therefore also conflict with numerous decisions in the district courts, most particularly Barbera v. Smith, 836 F.2d 96 (2d Cir. 1987) which held that the function of acquiring evidence jointly with law enforcement officials, prior to arrest and prosecution, is investigative, which does not require absolute immunity. This decision is even more applicable because the City Attorney acquired all the evidence on his own- he did not contact the law enforcement officials until the evidence had been 'acquired'. See also Hampton v. Hanrahan, 484 F.2d 601 (7th Cir. 1973); Briggs v. Stafford/Goodwin, *supra*, 569 F.2d 10,23 (D.C. Cir. 1977), cert. den. 98 S.Ct. 3089 (1978); Forsyth v. Kleindeinst, 599 F.2d 1203, 1215 (3rd Cir. 1979); McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982); and Gobel v. Maricopa County, 867 F.2d 1201 (9th Cir. 1989). Therefore, this important conflict should be resolved by this Court, in light of its decision in Burns and Buckley, and applied to city officials.

II. THE CALIFORNIA SUPREME COURT'S REFUSAL TO HEAR THIS CASE, SUSTAINING THE APPELLATE COURT'S HOLDING THAT PREJUDICIAL OUT OF COURT PUBLIC

STATEMENTS BY A CITY ATTORNEY ARE CLOAKED WITH ABSOLUTE PROSECUTORIAL IMMUNITY, IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THE ELEVENTH CIRCUIT COURT OF APPEALS; AND IT IS IN CONFLICT WITH THE DECISIONS OF NUMEROUS OTHER COURTS OF APPEALS AND WITH THIS COURT'S DECISIONS IN BURNS V. REED AND PAUL V. DAVIS; ADDITIONALLY, IT IS AN UNWARRANTED EXTENSION OF THIS COURT'S HOLDING IN IMBLER V. PACHTMAN

Petitioner alleges that the Respondents orchestrated and participated in a publicity campaign which injured him and prejudiced him in the community, so much that he lost his re-election campaign and adversely affected his business. This publicity campaign included false statements made to the press, and incorrect statements to the District Attorney and other members of the City Council. These statements alleged to the entire community that Petitioner had committed a felony by violating the conflict of interest provision in the California Government Code.

The California Appeals Court held that Respondents were entitled to absolute immunity for their statements. Petitioner alleges several injuries which were caused by the Respondent's conduct -- violation of civil rights, failure to be allowed to compete equally in the election, monetary loss to his business and loss of compensation as a Council Member, occasioned by these

prejudicial statements. This injury satisfies the test of Paul v. Davis, 424 U.S. 693 (1976). As stated in Lubey v. City and County of San Francisco 98 CA3d 340 (1979):

> "But there is an important exception to this rule, which is founded upon the Fourteenth Amendment. It arises where there is a deprival of the "liberty" guaranteed all persons by that amendment's due process clause. The exception will be applied where the probationary employee's job termination, or dismissal, is based on charges of misconduct which "stigmatize" his reputation, or "seriously impair" his opportunity to earn a living (Paul v. Davis, 424 U.S. 693, 702, or which "might seriously damage his standing or associations in his community" (Board of Regents v. Roth, 408 U.S. 564, 573 (1972); and to the same effect see McNeill v. Butz, 408 F.2d 314, 319; Daniel v. Porter, 391 F.Supp. 1006, 1010 (1975).)
>
> Where there is such a deprival of a "liberty interest" the employee's "remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the charge' [and] 'to clear his name.'" (Codd v. Velger, 429 U.S. 624, 627 (1977).)

As stated in Haight v. City of San Diego, 228 CA3d 413 (1991), the liberty interest is infringed only when the statement is made in connection with the loss of a government benefit, such as employment. Petitioner must allege that Respondents damaged Petitioner's reputation and altered or extinguished a state law right or status (opinion, 7). Petitioner alleges a government interest, that of being employed as a City Council Member for the City of Costa

Mesa (Petitioner's proposed second amended complaint, paragraph 4)[8]. Petitioner further alleges that his liberty interest has been deprived based on the misconduct of the Respondents in their acts which stigmatized his reputation and seriously impaired his standing in the community (paragraph 20). It is alleged that the stigma attached to his name has impaired his ability to earn a living as a City Council Member, or in any elective capacity whatsoever in the future and has further impaired his ability to earn a living.

The crux of Petitioner's claim is that the actions of Respondents extinguished the right to equally compete in an election for City Council Member, or to earn a living in the community. In Gold v. Los Angeles Democratic League, 49 CA3d 365 (1975), the court held that the misconduct of the respondents extinguished the petitioner's right to equally compete for election with the other candidates. This right to run for election on equal grounds is a state law right or status. Respondents' misconduct qualifies as the injury required in the Paul v. Davis test.

The decision of the lower court conflicts with previous

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[8] Hereinafter, all citations to the petitioner's proposed second amended complaint will only state the paragraph where the citation is contained.

decisions of three appellate circuits. See: Powers v. Coe, 728 F.2d 97, 103 (2d Cir. 1984) (Petitioner alleged a publicity campaign by prosecutors to deprive him of his right to fair trial by disclosing secret evidence that had been presented to the grand jury; the Second Circuit, finding that a prosecutor's dealings with the press were administrative, held that there was no absolute immunity for a prosecutor's "extraneous statements to the press designed to gain unfair advantage at trial"; Helstoski v. Goldstein, 552 F.2d 564, 566 (3rd Cir. 1977) (no absolute immunity for a prosecutor's deliberate leaks to the press in investigation leading to prosecution); and Taylor v. Kavanaugh, 640 F.2d 450 (2d Cir. 1981) (no absolute immunity for distributing extraneous statements to the press).

The lower court has strayed from the functional approach which this Court followed in Butz v. Economu, 438 U.S. 478, 511-12 (1978) and Forrester v. White, 484 U.S. 219, 227 (1988), by granting Respondent Kathe absolute immunity for investigative, rather than prosecutorial, acts. This decision grants Respondent Kathe absolute immunity in an area expressly left open by this Court's decision in Imbler v. Pachtman, *supra*, 424 U.S. 409, 430-1 (1976), and directly contradicts the approach and rationale for

granting such immunity, as subsequently restated in Butz, Forrester, Burns, and Buckley.

In Burns and Buckley, this Court recognized the importance of addressing prosecutorial conduct which the Imbler decision expressly left open. As a result, this Court limited immunity to pertain only to acts which are clearly prosecutorial, rather than investigative. Therefore, this Court should grant the Petition as to this question.

III. THE CALIFORNIA SUPREME COURT'S REFUSAL TO HEAR THIS CASE, SUSTAINING THE APPELLATE COURT'S GRANT OF ABSOLUTE LEGISLATIVE IMMUNITY TO CITY COUNCIL MEMBERS IS AN UNWARRANTED EXTENSION OF THIS COURT'S DECISION IN BRISCOE V. LAHUE, AND IS IN CONFLICT WITH THE SECOND CIRCUIT COURT OF APPEALS'S DECISION IN WHITE V. FRANK, AS WELL AS WITH THE RATIONALE OF BURNS V. REED

The Petitioner alleges that the Respondents, acting individually and in conspiracy with each other, manufactured city documents, regularly held meetings in furtherance of this conspiracy, and participated in the investigation against Petitioner.

Legislative immunity is not an absolute defense to Respondent Hornbuckle, because she was not acting in a legislative capacity. As alleged in the complaint, Respondent Hornbuckle was involved in the investigation (paragraphs 6, 10,

13) and met with other officials outside of the council meetings to conduct unauthorized business (paragraphs 14, 15). The lower court cited Tenney v. Brandhove, 341 U.S. 367, 379 (1951) as the controlling authority for legislative immunity. However, this case applies only where the legislator acted in an area where legislators are traditionally given the power to act. Respondent Hornbuckle clearly was not authorized to conduct an investigation against Petitioner, nor was she authorized to have access to confidential information regarding this investigation, given to her by Respondents Kathe and Roeder. Therefore, the Tenney does not apply to Respondent Hornbuckle.

Respondent Roeder likewise is not entitled to absolute legislative immunity for the main reason that he is not a legislator. As an investigator, he acted outside the scope of his duties as City Manager. He prepared a false document, stating that the City Council voted on the cable contract when it had not.

At best, Respondents Hornbuckle and Roeder fall within the category of an investigative official as set out in Imbler and Briggs, *supra*. As such, they are only entitled to qualified immunity.

The Ninth Circuit reviewed this issue in Trevino v. Gates, 92 D.A.R. 11169 (1992). In Trevino the court stated that :

> "Although a local legislature may vote on an issue, that alone does not necessarily determine that he or she was acting in a legislative capacity. Rather, '[w]hether actions...are, in law and fact, an exercise of legislative power depends not on their form but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect."' INS v. Chadha, 462 U.S. 919, 952, 103 S.Ct. 2764, 2784 (1983) (discussing Congressional action) (citation omitted). "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." Yakus v. United States, 321 U.S. 414, 424, 64 S.Ct. 660, 667 (1944). "

The court also stated that the more the act is directed solely to private interests, the more likely the act will be construed to be non-legislative in character. Clearly, the allegations made by Petitioner against Respondents fall within the latter factual situation discussed in Trevino. The Respondents here were not acting in a legislative capacity; their acts were dealing with matters which dealt specifically with the alleged acts of a City Council Member running for re-election. The Respondents released the false accusations six days before the election to undermine Petitioner's bid for re-election. These acts clearly demonstrate bad faith of individuals with ulterior motives, not that of legislators with the general public's best interest in mind. For these reasons, the Court should grant the Petition on this issue as well.

IV. RESPONDENT, CITY ATTORNEY KATHE AND PETITIONER HAD AN ATTORNEY-CLIENT RELATIONSHIP

In the complaint, Petitioner alleges causes of action against Respondent Kathe for breach of fiduciary duty, claiming that Respondent Kathe and Petitioner had an attorney-client relationship, which Respondent Kathe breached.

In Ward v. Superior Court, 70 CA3d 23 (1977), the court held that the basis of the attorney-client relationship is not contractual, but is statutory or mandated by a county or city charter. One of Respondent Kathe's duties was to represent city officials, including Petitioner.

Furthermore, it is clearly set out in the 1990 City of Costa Mesa principal budget and program information that Respondent Kathe was to represent the officers of the city in any suit. The duty states the Respondent Kathe "is to defend the city, its officers and employees whenever sued or made a party to any hearing." Moreover, the job description states that Respondent Kathe "is responsible for initiating and defending all lawsuits, including municipal code violations, involving the city, its officers, and staff." Further, while Respondent Kathe was investigating Petitioner, Petitioner asked Respondent Kathe in a study session in

which the subject of Copley Colony Cable arose for legal advise as his attorney. Respondent Kathe indicated that Petitioner should abstain from any discussion regarding Copley Colony, but he did not advise Petitioner that he was actively investigating Petitioner on this very issue, which clearly gives rise to a conflict of interest.

In addition, in Ward the court specifically cited Wutchumma Water Co. v. Baily, 216 C 564 (1932) for the proposition that a public attorney is forbidden from doing two things when he severs a relationship with a client:

> (1) The attorney may not do anything which will injure the former client in any manner previously represented, and (2) he may not use information against his former client acquired by virtue of their previous relationship (*Id.*, at 573,74).

In the present case, Respondent Kathe did both by injuring Petitioner as a City Council Member and client and using information against him obtained by virtue of their previous relationship, and reliance by Petitioner on the advise given to him by Respondent Kathe as his attorney.

Alan Grimes stated in "The City Attorney: a Practice Manual":

> "It has been said that a lawyer for a public against is fortunate inasmuch as he has only one client, the agency. This is not quite true. In a

> general law city in California there are five councilmen, and the attorney often finds himself with five would-be clients. This is where his trouble starts. He has been taught in law school to consider the corporate body as his client. A different of opinion often arises between the City Attorney's view of what is good from a legal aspect for the client and what each councilman believes is best for the client as he or she sees it."

Petitioner alleges such a relationship and legally he should be entitled to have representation. The Petitioner believed that Respondent Kathe was his attorney and that he was protecting his interests. For these reasons, the Court should grant the Petition on this issue as well.

CONCLUSION

For all the above reasons, Petitioner respectfully urges this Honorable Court to grant his Petition for a writ of certiorari on all the issues raised herein.

Respectfully submitted,

Dated: June __, 1994

LAWRENCE K. HARVEY
Attorney for Petitioner
2103 Valley Road
Costa Mesa, CA 92626
714/650-7470

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2103 Valley Road, Costa Mesa, California 92626.

On June 15, I served the foregoing document described as:

PETITION FOR WRIT OF CERTIORARI

on interested partied in this action by placing [ ] the original [ ] a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Costa Mesa, California addressed as follows:

Mr. Edwin J. Richards, Esq.
Edwin J. Richards & Associates
1055 North Main Street, Suite 922
Santa Ana, CA 92701

Court of Appeals, 4th Dist.
Division Three
925 N. Spurgeon
Santa Ana, CA 92701

Hon. Randall Wilkinson
Office of the County Clerk
700 Civic Center Drive West
Santa Ana, CA 92701

California Supreme Court
303 Second Street
San Francisco, CA 94107

[X] (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail. Executed on June 15 1994 at Costa Mesa, California.

[ ] (PERSONAL SERVICE) On the __ day of June 1994, I served a copy of the papers to which this proof of service is attached by personally serving:

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Lawrence K. Harvey

APPENDIX A

FILED NOVEMBER 18, 1993

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ORVILLE AMBURGEY,	)	GO13222
Plaintiff and Appellant,	)	(Super. Ct. No. 669203)
v.	)	O P I N I O N
CITY OF COSTA MESA, et al.,	)	
Defendants and Respondents.	)	

APPEAL from a judgment of the Superior Court of Orange County, Randall K. Wilkinson, Judge. Affirmed.

Burns & Oblachinski and Michael F. Burns for Plaintiff and Appellant.

Michael M. McMahon and Edwin J. Richards for Defendants and Respondents.

* * *

Plaintiff Orville Amburgey, former Costa Mesa councilman, was investigated for conflict of interest by the city attorney, who then referred the matter to the Orange County District Attorney. When the district attorney dismissed the charges, Amburgey filed a complaint for damages against the city, its mayor, Mary Hornbuckle, its city manager, Allan Roeder, and its city attorney, Thomas Kathe (collectively respondents). Respondents' demurrer to the first amended complaint was sustained without leave to amend and Amburgey appeals, contending: (1) he had a federally protected right to bring his action; (2) Kathe was entitled only to qualified immunity because he acted as an investigator; (3) Hornbuckle and Roeder were only entitled to qualified immunity because they were not acting in a legislative capacity; and (4) Amburgey and Kathe had an attorney/client relationship which Kathe breached.[1]

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[1] The order sustaining the demurrer without leave to amend is not appealable. (Code Civ. Proc., § 904.1.) However, a judgment of dismissal was entered by the court on July 26, 1993. Therefore, because the parties have briefed the issues, in the interests of justice and to prevent unnecessary delay, we deem the order sustaining the demurrer to incorporate the judgment and treat the notice of appeal as being taken therefrom. (See Munoz v. Florentine Gardens (1991) 235 Cal.App.3d 1730, 1731-132.)

FACTS

Amburgey was a Costa Mesa city council member. He also owned Amburgey Electric, a business which performed subcontract work for a company which provided cable television to the city under a franchise agreement. City Attorney Kathe concluded Amburgey may have violated state conflict of interest laws by voting on a franchise agreement with that company.[2] He informed City Manager Roeder of his conclusions and referred his findings to the district attorney. It was Kathe's belief Amburgey may have committed felonies and Kathe was only empowered to prosecute misdemeanors. Thereafter, the district attorney's office

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[2] Kathe believed Amburgey violated Government Code sections 8710, 87103 and 91000 of the Political Reform Act of 1974. (All statutory references are to the Government Code unless otherwise specified.)

Section 87100 provides in part: "No public official . . . shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

Section 87103 states in part: "An official has a financial interest in a decision . . . if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family . . ."

Under section 91000, a violation of the Political Reform Act is prosecuted as a misdemeanor.

conducted its own investigation and, after filing a misdemeanor charge against Amburgey, subsequently dismissed all criminal charges.

Amburgey then filed his complaint for damages against respondents, alleging causes of action for deprivation of rights under color of state law (42 U.S.C., §§ 1983, 1988), legal malpractice, breach of fiduciary duty, conspiracy, slander per se, libel per se, intentional infliction of emotional distress, and negligent infliction of emotional distress. The gravamen of the complaint was that respondents injured him by reporting the apparent criminal violations to the district attorney and the press. After respondents' demurrer was sustained with leave to amend, Amburgey filed a first amended complaint, and, at this time, respondents' demurrer was sustained without leave to amend.

The trial court ruled Amburgey's civil rights cause of action failed to allege any violation of a federally protected right, that City Attorney Kathe was entitled to absolute immunity because he was acting in his prosecutorial capacity, and that Mayor Hornbuckle and City Manager Roeder were entitled to absolute legislative immunity. As for the legal malpractice and breach of fiduciary duty causes of action against Kathe, the court ruled the complaint failed to state a cause of action based on an attorney/city relationship.

The court then granted Amburgey's motion for reconsideration and affirmed its prior ruling. This appeal followed.

STANDARD OF REVIEW

In ruling on an order sustaining a demurrer without leave to amend, this court must determine whether the complaint states a cause of action even though "the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged." (Matteson v. Wagoner (1905) 147 Cal. 739, 742; see also Lacher v. Superior Court (1991) 230 Cal.App.3d 1038, 1043.) The question is whether the complaint states a cause of action under any legal theory. (Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94, 103.) Moreover, any material fact alleged in the complaint must be assumed true, except for contentions, deductions, or conclusions of fact or law, and allegations contradicted by judicially noticed facts. (Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 572.)

DISCUSSION

A. The Cause of Action for Civil Rights Violations

Amburgey attempted to allege a cause of action for deprivation of rights under color of state law. (42 U.S.C. §§ 1983,

1988.)[3] To state such a cause of action, plaintiff must allege the deprivation of a right, immunity, or privilege guaranteed under federal law. (Parratt v. Taylor (1981) 451 U.S. 527, 535.) Amburgey's first amended compliant alleged respondents deprived him of his rights, privileges and immunities under the United States Constitution in that their actions "amounted to an arbitrary invasion . . . the security of

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[3] 42 U.S.C. section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. section 1988 states in part: "(a) The jurisdiction . . . conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons of the United States in the civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and governed the said courts in the trial and extended to and governed the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

[Amburgey's] privacy, person and business and were not authorized by law." It further alleged he had a property right in employment as a city council member, that he had the right to be free from stigma, and that he was damaged as a result of stigma caused by respondents and loss of employment as a council member.

As for his contention that respondents deprived him of a property right in the form of employment, Amburgey is correct that government employment may, under certain circumstances, be a protected property interest. However, the mere subjective expectancy of employment does not give rise to a property interest for the purpose of bringing the due process clause into play in an action under 42 U.S.C. section 1983. (See Jones v. Hopper (10th Cir. 1969) 410 F.2d 1329.) A discharged employee must have an "entitlement" to employment before he or she is entitled to a protected property interest. Here, Amburgey had no entitlement to continued employment as a council member. At most, he had a subjective expectancy of continued employment, but no property interest in continuing as a council member.

In addition, the United States Supreme Court has made it clear that an allegation of defamation by a government official does not give rise to a cause of action for civil rights violations. (Paul v. Davis

(1976) 424 U.S. 693, 712.) I Paul the plaintiff claimed government officials violated his rights by including his name on a list of shoplifters which was circulated to businesses, and argued the stigmatization impaired his future employment opportunities. However, the Supreme Court affirmed the dismissal of his action, noting that the mere fact that a state official is the alleged tortfeasor does not give rise to a federal civil rights cause of action and that damage to reputation alone does not rise to the level of a constitutional violation. (Id. at pp. 700-701.) The Supreme Court reemphasized a long line of case law holding that damage to reputation, without more, does not rise to the level of a constitutional violation. (Id. at pp. 702-711.) Accordingly, Amburgey was required to allege that respondents damaged his reputation and altered or extinguished a state law right or status. He failed to do so.

Amburgey argues the Supreme Court held in Paul v. Davis, supra, 424 U.S. 693 that "there is a liberty interest protected by the Fourteenth Amendment when you are dealing with termination of employment benefits . . ." However, Paul makes it clear that a plaintiff may not indirectly bring a defamation action under 42 U.S.C. section 1983 merely because the defendant is a government official, unless he or

she can show stigmatization and the deprivation of a state law right or status.

The "state right" alleged by Amburgey is his "right to run for office and be gainfully employed as a city councilman . . ." However, Amburgey failed to allege facts sufficient to show that respondent altered or extinguished any right. His employment as a council member was altered or extinguished by the voters of Costa Mesa, not respondents.

Amburgey's reliance upon Wisconsin v. Constantineau (1971) 400 U.S. 433 is misplaced. He argues that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (Id. at p. 437.) However, the Supreme Court in Paul rejected Amburgey's interpretation of the language in Wisconsin v. Constantinuea, stating that the language "could be taken to mean that if a government official defames a person, without more, the procedural requirements of the Due Process Clause of the Fourteenth Amendment are brought into play. If read that way, it would represent a significant broadening of the holdings of [prior Supreme Court cases']." (Paul v. Davis, supra, 424 U.S. at p. 708.) Here, as in Paul, no governmental

action deprived Amburgey of a right he previously held under state law.

Amburgey seeks to rely upon Rodriquez De Quinonez v. Perez (1st Cir. 1979) 596 F.2d 486 for the proposition that he "had a state right to run for office and to be gainfully employed as a city councilman. [He] had a right to be considered equal with other individuals who were also running for that position. The government action in this case deprived him of that right by placing him in an extreme disadvantage to the other candidates . . ." However, Rodriquez De Quinonez is inapposite. There, the plaintiffs were former directors of the Bank of Puerto Rico. The trial court found their removal by the Secretary of Treasury amounted to a violation of a liberty interest because their removal stigmatized them and denied them a right previously held under state law. (Id. at p. 489.) Here, unlike the plaintiffs in Rodriquez De Quinonez, Amburgey has not been able to identify any state right which could have been arguably extinguished by respondents. He claims a state law right to run for and hold office but there is no authority for the source of such a right. Moreover, the plaintiffs in Rodriquez De Quinonez were removed from their positions by a government official. (Id. at p. 488.) Here, Amburgey cannot allege that respondents terminated or removed him from his position. He

was removed by the voters.

Amburgey also seeks to rely upon Haight v. City of San Diego (1991) 228 Cal.App.3d 413 and Lubey v. City and County of San Francisco (1979) 98 Cal.App.3d 340 for the proposition that where there is deprivation of a "liberty" guaranteed under the due process clause, a nontenured employee who is stigmatized as a result of termination is entitled to due process. Again, the argument ignores the fact that in those cases, the plaintiffs were terminated by government employees. (Haight v. City of San Diego, supra, at p. 415; Lubey v. City and County of San Francisco, supra, 98 Cal.App.3d at p. 344.) Any actionable stigma to a plaintiff's reputation must result from his or her termination or dismissal from employment.

Amburgey argues termination is not required, relying on Perry v. Sindermann (1972) 408 U.S. 593. In Perry, the plaintiff brought suit when his employment was not renewed. As with cases involving termination, however, Perry involved a conscious decision by government officials to end the plaintiff's employment, thus triggering the due process requirements. (See e.g., Neu v. Corcoran (2nd Cir. 1989) 869 F.2d 662; Lubey v. City and County of San Francisco, supra, 98 Cal.App.3d at p. 344.)

Here, Amburgey merely alleges he was defamed by respondents. He attempts to turn a potential state law cause of action into a federal civil rights action by alleging a tenuous link between the "stigma" he suffered and his loss of employment. However, he was not terminated, and his employment was in no way curtailed by respondents. He was voted out of office by the voters of the City of Costa Mesa. For these reasons, Amburgey failed to state facts sufficient to show that any federal right was infringed upon, and the trial court properly ruled that he failed to state a cause of action under 42 U.S.C. section 1983.

B. Was Kathe Entitled to absolute Prosecutorial Immunity?

Amburgey next contends City Attorney Kathe was not entitled to absolute prosecutorial immunity because he acted as an investigator. The substance of his allegations is that he was injured because Kathe brought charges against him, then turned the matter over to the district attorney and notified the press. Under a long line of Supreme Court cases, Kathe's actions must be considered prosecutorial and he is entitled to absolute immunity.

In Imbler v. Pachtman (1976) 424 U.S. 409, the United States Supreme Court emphasized the strong public policy considerations

mandating absolute immunity from civil liability for a prosecutor under such circumstances. The court observed that the mere grant of qualified immunity to a prosecutor would undermine his or her performance and that "public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." (Id. at pp. 424-425.)

In Briggs v. G[illegible]win (D.C. Cir. 1977) 569 F.2d 10, the Court of Appeals observed that the "crucial inquiry [on the question of immunity] concerns the nature of the official behavior challenged, not the identity or title of the officer responsible therefor." (Id. at p. 21.) The court defined prosecutorial activities as the exercise of "judicial or quasi-judicial discretion." (Ibid.; see also McCray v. Maryland (4th Cir. 1972) 456 F.2d 1, 3-4.)

Read together, Imbler and Briggs establish that a prosecutor is absolutely immune for prosecutorial activities. Here, Kathe's actions justified the grant of absolute immunity.

Section 91001.5 gives a city attorney the power to prosecute violations of the Political Reform Act. Section 42803.5 authorizes a city attorney to prosecute misdemeanor violations occurring in his or her city. Costa Mesa Municipal Code sections 2-401 and 2-408

parallel the Government Code on conflict of interest, and section 1-33 empowers the city attorney to prosecute criminal violations of those conflict of interest provisions. Here, the allegations of Amburgey's complaint compel the conclusion that Kathe was acting as a prosecutor under these provisions.

Although Amburgey claims Kathe's investigative activities damaged him, the complaint alleges only that Kathe and others disclosed the results of their investigation to the press and turned over their results to the district attorney. These actions were part and parcel of the decision by the city attorney to initiate a prosecution as authorized by the Government Code and the Costa Mesa Municipal Code. A prosecutor is absolutely immune from liability under section 1983 for his or her conduct in initiating a prosecution so long as that conduct is "intimately associated with the judicial phase of the criminal process." (Imbler v. Pachtman, supra, 424 U.S. at 430-431; see also Burns v. Reed (1991) 500 U.S. _____, ____ 114 L.ed.2d 547, 558.) Here, Amburgey alleges Kathe engaged in investigative acts. It is true that the Supreme Court in Imbler did not decide whether absolute immunity should extend to "those aspects of the prosecutor's responsibility that cast him in the role of an . . . investigative officer rather than that of an

advocate." (Imbler v. Pachtman, supra, at pp. 430-431.) However, the court noted that "the duties of the prosecutor in his role as advocate . . involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." (Id. at p. 431, fn. 33.) Here, fairly read, Amburgey's complaint seeks to predicate an action for damages upon the contention that Kathe, "acting within the course and scope of [his] employment," brought criminal charges against Amburgey for conflict of interest, then referred the matter to the district attorney who filed, then dismissed, criminal charges. Kathe was authorized by Government Code sections 91001.5 and 41803.5 to prosecute violations of the Political Reform Act and to prosecute misdemeanor violations occurring in the city. He was similarly empowered by Costa Mesa Municipal Code sections 2-401, 2-408 and 1-33 to enforce conflict of interest laws. Although the complaint states Kathe's actions were investigative, the alleged facts reveal his acts were part of the decision of whether to initiate a prosecution against Amburgey, and as such within his duties as a prosecutor. (Imber v. Pachtman, supra, 424 U.S. at p. 431, fn. 33; Burns v. Reed, supra, 500 U.S. at p. ___. Kathe is entitled to absolute

immunity for the allegations in Amburgey's complaint.[4]

C. Were Hornbuckle and Roeder Entitled to Absolute Legislative Immunity?

Amburgey next argues that Mayor Hornbuckle and City Manager Roeder are not entitled to absolute immunity. Again, we disagree.

As the United States Supreme Court has made clear, a legislator who acts in a sphere of legitimate legislative activity is absolutely immune from civil liability for his or her acts. (See Tenney v. Brandhove (1952) 341 U.S. 367, 379.) In Tenney, the plaintiff charged members of the California Legislature with investigating, then requesting local prosecutorial officials to instigate a criminal action against him. He alleged these acts were not done with a legislative purpose but to "intimidate and silence [him] and deter and prevent him from effectively exercising his constitutional rights . . . " (Id. at p. 371.) The Supreme Court held the legislators were entitled to absolute

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[4] The complaint, while alleging "investigative activities" fails to state facts sufficient to overcome the absolute immunity. Rather, it is a thinly veiled attempt to disguise a cause of action for malicious prosecution, for which a prosecutor is absolutely immune. (Burns v. Reed, supra, 500 U.S. at p. ___, citing Vaselli v. Goff (1926) 265 U.S. 503.)

immunity, stating that investigations are a necessary and well recognized aspect of representative government. (id. at p. 377.) The only question, according to the court, is whether the legislator has acted in an area where legislators traditionally have the power to act. (Id. at -. 379.) Tenney's proclamation as to absolute legislative immunity to state legislators has subsequently been applied to regional and municipal officials. (See, e.g., Lake County Estates, Inc. v. Tahoe Reg'l. Planning Agency (1979) 440 U.S. 391; Healy v. Town of Pembroke Park (11th Cir. 1987) 831 F.2d 989; Atchison v. Raffiani (3rd Cir. 1983) 709 F.2d 96.)

Public policy supports the grant of absolute immunity to legislators acting in an area where they are traditionally empowered to act. Based on the allegations of the complaint, Hornbuckle and Roeder are entitled to absolute immunity.

Moreover, "except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." (Govt. Code, § 815.2, subd. (b).) Because respondents Kathe, Hornbuckle and Roeder had absolute immunity for their alleged acts committed within the course and scope of their duties, respondent

City of Costa Mesa cannot be held liable to Amburger either.

D. Did Kathe and Amburgey

Have an Attorney/Client Relationship?

Finally, in his first amended complaint and proposed second amended complaint, Amburgey alleges cause of action against City Attorney Kathe for legal malpractice and breach of fiduciary duty, claiming Kathe for legal malpractice and breach of fiduciary duty, claiming Kathe and he had an attorney/client relationship, which Kathe breached. He ignores the fact that Kathe's client was the City of Costa Mesa and it was the city to which he owed a duty.

In Ward v. Superior Court (1977) 70 Cal.App.3d 23, the Court of Appeal concluded that a county counsel's representation of county officers in civil actions did not alter the fact that county counsel has only one client, the county. (Id. at p. 32; see also Meehan v. Hopps (1956) 144 Cal.App.2d 284, 290 ["attorney for a corporation represents it, its stockholders and its officers in their representative capacity. He in nowise represents the officers personally."].)

In addition, Government Code section 41805 provides that the city attorney charged with prosecutorial discretion shall not represent any person accused of violating an ordinance of the city that

employs the attorney. (See also People v. Pendleton (1979) 25 Cal.3d 371, 379; People v. Rhodes (1974) 12 Cal.3d 1880, 187.) Thus, respondent Kathe was precluded from performing or entering into an any attorney/client relationship with Amburgey concerning the alleged conflict of interest charges.

Amburgey alleges legal malpractice under Government Code section 41801, which provides that "[t]he city attorney shall advise the city officials in all matters pertaining to city business." However, this has no effect on the issue of any relationship between the city attorney and a city council member. Again, section 41801 provides that the city attorney's advice is restricted to "legal matters pertaining to city business." Nothing in section 41801 requires a city attorney to give advice to a city official facing criminal charges.

Here, the allegations of the first amended complaint reveal only that respondent Kathe fulfilled his duty to the city and did not give protection or advice to Amburgey. A city attorney may not be exposed to civil liability for performing his or her duties. Accordingly, Amburgey's complaint fails to state a cause of action for legal malpractice or breach of fiduciary duty.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

WALLIN, J.

CROSBY, J.

APPENDIX B

44TH CIVIL NO.
GO13222

FILED DECEMBER 31, 1992

In the Court of Appeal

FOURTH APPELLATE DISTRICT
State of California
DIVISION THREE

ORVILLE AMBURGEY *Plaintiff,*

vs.

THE CITY OF COSTA MESA, et al., *Defendants.*

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
HON. RANDALL K. WILKINSON

APPELLANT'S BRIEF

BURNS & OBLACHINSKI
MICHAEL F. BURNS
3403 Tenth Street, Suite 700
Riverside, CA 92501
(909) 781-9970
Attorneys for Plaintiff
Orville Amburgey

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MICHAEL F. BURNS
Law Offices of Burns & Oblachinski
3403 Tenth Street, Suite 700
Riverside,California 92501
714-781-9970
LAW OFFICES OF LAWRENCE K. HARVEY
Westerly Place
1500 Quail, Suite 440
Newport Beach, CA 92660
714-851-0281

Attorney for Plaintiff/Appellant, ORVILLE AMBURGEY

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

ORVILLE AMBURGEY, an individual, Plaintiff and Appellant, vs. THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS A. KATHE, City Attorney for the City of Costa Mesa, an individual; ALLAN ROEDER, City Manager for the City of Costa Mesa, and individual; MARY HORNBUCKLE; an individual, and DOES 1-100, inclusive, Defendants and Respondents.	CASE NO: G013222 ORANGE COUNTY SUPERIOR COURT NO.; 66-92-03 APPELLANT'S OPENING BRIEF

FACTUAL BACKGROUND

In June of 1990, Orville Amburgey, plaintiff and appellant herein, was an elected city councilman for the City of Costa Mesa. Mr. Amburgey had held the position of city councilman for four years and was paid as a city councilman during that time. In October of 1990, Mr. Amburgey was involved in a heated re-election campaign to retain his council position. Six days prior to the general election, defendants Mary Hornbuckle, Thomas Kathe, and Allan Roeder released information to the press alleging that Mr. Amburgey had committed a felony while acting as a city councilman.

At Mr. Kathe's insistence, these allegations were also forwarded to the Orange County District Attorney's Office which in turn filed a criminal complaint against Mr. Amburgey for an alleged conflict of interest in violation of California Government Code sections 1090 and 1097. The basis of the compliant was an alleged conflict of interest between Mr. Amburgey and Copley Colony, a cable contractor for television service for the City of Costa Mesa.

In letters to the Orange County District Attorney's Office, Mr. Kathe outlined an investigation that he conducted which he claimed showed that Mr. Amburgey had voted on the cable television contract while at the time of the vote he had a financial interest in the franchise

company. Mr. Kathe based his allegations on a review of city documents, interviews of witnesses, and a review of public records. Defendant Hornbuckle and Roeder assisted Mr. Kathe in conducting his investigation and all these individuals met on several occasions and discussed the progress of the investigation and which avenues should be pursued in developing evidence to substantiate the charges against Mr. Amburgey.

Mr. Amburgey was never questioned nor advised as to the investigation or the conclusions reached by the defendants until he read about it in the newspaper six days before the election. Once he learned of the allegations, Mr. Amburgey conducted his own investigation and learned that the accusations were entirely without merit. Mr. Amburgey presented his evidence to the Orange County District Attorney, who agreed to dismiss the case.

During Mr. Amburgey's investigation, he learned that Mr. Roeder had created certain official city documents that were inaccurate and these documents were used by Kathe and Hornbuckle to substantiate their position. Mr. Amburgey learned that the three defendants, in the manner of their actions, wanted to unseat Mr. Amburgey from the city council and thus were motivated to release the unsubstantiated allegations

without offering him any due process or an opportunity to rebut the allegations. As a result, Mr. Amburgey lost the election and was replaced on the city council.

STATEMENT OF THE CASE

On September 23, 1991, plaintiff filed a complaint against the City of Costa Mesa, Thomas Kathe, Mary Hornbuckle, and Allan Roeder for a deprivation of civil rights, legal malpractice, breach of a fiduciary duty, conspiracy and other related counts. On February 26, 1992, the court sustained the defendant's demurrer to the complaint.

On March 23, 1992, plaintiff filed an amended complaint alleging the same causes of action with a different statement of facts. On June 3, 1992, the court sustained defendant's demurrer to the amended complaint without leave to amend.

On June 16, 1992, plaintiff filed a motion for reconsideration with a proposed second amended complaint. On September 23, 1992, the court reconsidered its prior ruling and the proposed complaint and ordered that the original ruling was to stand. The plaintiff then filed his appeal.

I.

DID THE PLAINTIFF HAVE A FEDERALLY PROTECTED RIGHT SUFFICIENT TO STATE A CAUSE OF ACTION

Plaintiff had a federally protected right at the time of the defendants acts by being an employee of the City of Costa Mesa. The United States Supreme Court addressed this issue in Paul v. Davis, wherein the court held that there is a liberty interest protected by the Fourteenth Amendment when you are dealing with termination of employment benefits (424 U.S. 693, 47 L.Ed.2d 404, 96 S.Ct. 1155).

The Paul case has been analyzed by State Appellate Courts on numerous occasions. As stated in Lubey v. City and County of San Francisco (1979) 98 CA3d 340...

> "But there is an important exception to this rule, which is founded upon the Fourteenth Amendment. It arises where there is a deprival of the "liberty" guaranteed all persons by that amendment's due process clause. The exception will be applied where the probationary employee's job termination, or dismissal, is based on charges of misconduct which "stigmatize" his reputation, or "seriously impair" his opportunity to earn a living (Paul v. Davis, 424 U.S. 693, 702 [47 L.Ed.2d 405, 414, 96 S.Ct. 1155]), or which "might seriously damage his standing or associations in his community" (Board of Regents v. Roth, supra, 408 U.S. 564, 573 [33 L.Ed.2d 548 558}; and to the same effect see (McNeill v. Butz, supra 408 F.2d 314, 319; Daniel v. Porter, supra, 391 F.Supp. 1006, 1010).
>
> Where there is such a deprival of a "liberty interest" the employee's remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the

> charge' [and] to clear his name.'" (Codd v. Velger, supra, 429 U.S. 624, 627 [51 L.Ed.2d 92, 96].) He must be afforded "'"notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective."'" (Board of Regents v. Roth, supra, 408 U.S. 564, 570, fn. 7 [33 L.Ed.2d 548,556].)

The Fourth District Court of Appeal has used similar rationale in deciding these cases. As set out in Haight v. City of San Diego (1991) 228 CA3d 413...

> "It is well established "[a] person's protected interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citation.] Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as, ...employment. [Citations.]" (Murden v. County of Sacramento, supra, 160 Cal.App.3d at p. 308.)

interest, that of being employed as a city councilman for the City of Costa Mesa (plaintiff's proposed second amended complaint, paragraph 4). The plaintiff has further alleged that his liberty interest has been deprived based on the misconduct of the defendants in their acts which stigmatized his reputation and seriously impaired his standing in the community (plaintiff's proposed second amended complaint, paragraph 20) (clerk's transcript pg. 231). It is further alleged to earn a living as a city councilman in the future (clerk's transcript pg. 234). Clearly these are protected interests as set out in Wisconsin v. Constantineau (1971)

400 U.S. 507; 91 S.Ct. 507...

Clearly, the government violation of a protected right does not require termination of an employee. As stated in Perry v. Sinderman, (1972) 408 US. 593, 92 S.CT. 2694...

> The first questions presented is whether the respondent's lack of contractual or tenure right to re-employment, taken alone, defeats his claim that the non-renewal of his contract violated the First and Fourteenth Amendments. We hold it does not." (ID. at 2697.)

The protected interest as it applies to government defamation has been further examined by the U.S. District Court 1st Circuit Appeals in Rodriquez v. Perez 596 F2d 486 (1979), wherein the court stated:

> "While defamation by a governmental official, standing alone, does not work a deprivation of liberty protected by the fourteenth amendment, Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), governmental action altering a right or status previously held under state law "combined with the injury resulting from the defamation, justifie[s] the invocation of procedural safeguards." Id at 708-09, 96 S.Ct. at 1164. See also Ventetuolo v. Burke, 596 F.2d 476 (1st Cir. 1979). The Fifth Circuit has capsulized the import of Paul v. Davis into the following "stigma-plus" test: "'To establish a liberty interest sufficient to implicate fourteenth amendment safeguard, the individual must be not only stigmatized but also individual must be not only stigmatized but also stigmatized in connection with a denial of a right or status previously recognized under state law'." Dennis v. S & S Consolidated Rural High School District, 577 F.2d 338, 341 (5th Cir. 1978) quoting Moore v. Otero, 557 F.2d at 437. We have said that "when a state holds out a right to citizens to engage in an activity on equal terms with others, a state-recognized status exists." Medina v. Rudman, 545 F.2d 244, 250 (1st Cir. 1976), cert. denied, 434

U.S. 891, 98 S. Ct. 266, 54 L.Ed.2d 177. Here, Title 7, chapter 66 of the laws of Puerto Rico sets forth general terms pursuant to which an individual may serve as director; hence, we think the "plus" of the stigma-plus test is satisfied." (ID. at 489).

In the present case, the plaintiff had a state right to run for office and to be gainfully employed as a city councilman. Plaintiff had a right to be considered equal with other individuals who were also running for that position. The government action in this case deprived him of that right by placing him in an extreme disadvantage to the other candidates by the defamation created by the government employees working for the City of Costa Mesa.

II.

IS A CITY ATTORNEY ABSOLUTELY IMMUNE WHEN HE ACTS AS AN INVESTIGATOR

The Imbler Court granted absolute immunity to prosecutors only in those cases where the prosecutor was acting in a prosecutorial capacity [Imbler v. Pachtman 424 U.S. 409 (1976)]. The Imbler Court was very specific in delineating between prosecutorial activities and those activities which are investigative in nature. Imbler stated:

"It remains to delineate the boundaries of our holding. As noted, supra, at 988, the Court of Appeals emphasized that

each of respondent's challenged activities was an "integral part of the judicial process." 500 F.2d, at 1302. The purpose of the Court of Appeals' focus upon the functional nature of the activities rather than respondent's status was to distinguish and leave standing those cases, in its Circuit and in some others, which hold that a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's. See Pierson v. Ray 386 U.S., at 557, 86 S.Ct., at 1219. We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under section 1983." (ID. at 430-31).

As the court indicated in footnote 33, there are certain activities that a prosecutor could engage in that say will not fall within the absolute immunity addressed. Instead, he initiated and carried out his own investigation including the interviewing of witnesses, reviewing documents and discussing the case with other officials (clerk's transcript pgs. 231-32). No investigation was done by the police department even though that is their initial duty as evidenced by plaintiff's exhibit C attached to the complaint. In fact, defendants never even filed the case for prosecution but instead presented it to the Orange County District Attorney for prosecution. Clearly, he was acting as an investigator or

policeman not as a prosecutor. As such, he is only entitled to qualified immunity. (Plaintiff's 2nd Amended Complaint, paragraphs 6, 8, 9.)

This concept is supported in the Briggs v. Goodwin/Stafford 569 F.2d 10 (D.C. Cir. 1977) case which states:

> "When a prosecutor is engaged in essentially investigative as opposed to advocatory activities, the considerations of public policy which necessitated a grant of absolute immunity in Imbler no longer control. Regardless of his official status, a prosecutor functioning primarily as an investigator should be accorded only the qualified immunity typically conferred on other investigative officers. The crucial inquiry concerns the nature of the official behavior challenged, not the identity of title of the officer responsible therefore." (ID at 21.)

In the present case, Plaintiff has alleged that the Defendant, Kathe, was acting as an investigator and that as such he is only entitled to qualified immunity. Plaintiff has alleged sufficient facts to put the question to the jury.

III.

ARE DEFENDANTS' HORNBUCKLE AND ROEDER ENTITLED ABSOLUTE LEGISLATIVE IMMUNITY

Plaintiff has stated a cause of action against all defendants for a violation of a federally protected right. As stated in plaintiff's Complaint "all defendants" were involved in investigating the plaintiff. (Plaintiff's 2nd Amended Complaint, paragraph 6.)

Moreover, legislative immunity is not an absolute defense

to Defendant, Hornbuckle, since she was not acting in a legislative capacity. As alleged in the Complaint, Defendant, Hornbuckle, was involved in the investigation (paragraphs 6, 10, 13) (clerk's transcript pgs. 231 and 232) and met with other individuals outside of the normal council meeting to conduct unauthorized business (paragraphs 14, 15) (clerk's transcript pg. 233).

At best, Hornbuckle and Roeder fall within the category of an investigative official as set out in Imbler and Briggs, supra. As such they are only entitled to qualified immunity and not absolute immunity.

The United States District Court for the Ninth Circuit has just reviewed this issue in Trevino v. Gates 92 D.A.R. 11169 (1992). In that case, it was stated that:

> "The Ninth Circuit has formulated the issue in the following ways:
>
> Although a local legislature may vote on an issue, that alone does not necessarily determine that he or she was acting in a legislative capacity. Rather, '[w]hether actions...are, in law and fact, an exercise of legislative power depends not on their form but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect."' INS vs. Chadha, 462 U.S. 919, 952, 103 S.Ct. 1764, 2784, 77 L.Ed.2d 317 (1983) (discussing Congressional action) (citation omitted). "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." Yakus v. United States,

321 U.S. 414, 424, 64 S.Ct. 660, 667, 88 L.Ed."

The court went on to state that:

> "The more the particular acts of legislators are directed toward the consideration and adoption of legislation of general application, the more clearly the acts are legislative in character. Conversely, the more the particular the act, albeit done by vote of the legislature, is directed solely to private interests, the more likely the act will be construed to be nonlegislative in character. See Hughs v. Tarrant County, Tax., 948 F.2d 918 (5th Cir. 1991). This distinction appears consistent with the policies behind immunity. When legislators deal with legislation which will affect the public at large, there is maximum interest in freeing them from the threat of lawsuits brought by interested private parties who may be harmed by legislation passed for the general good. When legislators address matters of very limited application, (so that the persons whose interests are at odds with those of the public as a whole), it is less defensible to shield the legislators from liability when their acts are in bad faith or otherwise in contravention of clearly established law."

Clearly, the facts presented in plaintiff's proposed complaint fall within the latter factual situation discussed in Trevino. The defendants in this case although city officials were not acting as such. Their acts were dealing with matters of very limited application in that they dealt specifically with the alleged acts of a city councilman who was up for re-election. The defendants decided to release the false accusations six days before the election to undermine plaintiff's bid for re-election. These acts clearly demonstrate bad faith of individuals with ulterior motives, not that of legislators with the general public's best

interest in mind.

IV.

DID ATTORNEY KATHE AND PLAINTIFF HAVE AN ATTORNEY-CLIENT RELATIONSHIP

It has been held that a public attorneys relationship is one of a statutory duty in nature rather than a contractual one. In the present case, plaintiff was a client of Defendant, Kathe, based on the city charter and its contractual agreement with Kathe. As set out in Ward v. Superior Court (1977) 70 CA3d 23...

> "The parties have cited no analogous cases with respect to the application of rule 4-101 in a case involving a public attorney, such as the county counsel, nor has our independent research disclosed any such case. (2) It is to be noted that the basis of the attorney-client relationship in the case of public attorneys is not contractual, as is the case in the normal attorney-client relationship, but rather is statutory or mandated by a county or city charter.

It is clearly set out in the City of Costa Mesa principal budget and program information for 1990 that Defendant, Kathe, was to represent the officers of the city in any suit.

As stated the legal services department is to:

> "(2.) To defend the city, its officers and employees whenever employees whenever sued or made a party to any administrative hearing.

Moreover, the description for the job states:

"DESCRIPTION: This element is responsible for initiating and defending all lawsuits, including municipal code violations, involving the City, its officers, and staff. It represents the City as attorney of record for all civil and criminal litigation and hires and oversees outside counsel when necessary.

A copy of the program budget and description is attached to plaintiff's proposed second amended complaint. Although counsel has cited the leading cases in Ward the court specifically cited Wutchumma Water Co. vs. Baily (1932) 216 C 546 for the proposition that a public attorney is forbidden from doing two things when he severs a relationship with a client.

> (1) The attorney may not do anything which will injure the former client in any manner previously represented and (2) he may not use information against his former client acquired by virtue of their previous relationship. (ID at 573-74).

In the present case, Mr. Kathe has done both by injuring plaintiff as a city councilman and using information against him obtained by virtue of their previous relationship.

As stated by Alan Grimes in "The City Attorney: a Practice Manual":

> "It has been said that a lawyer for a public agency is fortunate inasmuch as he has only one client, the agency. This is not quite true. In a general law city in California there are five councilmen, and the attorney often finds himself with five would-be clients. This is where his trouble starts. He has been taught in law school to consider the corporate body at his client. A difference of opinion often arises between the City Attorney's

view of what is good from a legal aspect for the client and what each councilman believes is best for the client as he or she sees it."

This subject has been the topic of many city attorneys questions and dilemmas as indicated by the League of California Critics paper delivered by Michael Miller in 1979. One thing that is clear is that many commentators recognize that as it stands the city attorney may represent not only the city but council members on an individual basis under various different factual situations. Plaintiff has alleged such a relationship and legally he should be entitled to proceed. The plaintiff believed that Mr. Kathe was his attorney and that he was protecting his interests.

V.

CONCLUSION

Based on the above, plaintiff/appellant prays that the court will reverse the lower courts ruling and allow the plaintiff's proposed second amended complaint be filed.

DATED: December 30, 1992 BURNS & OBLACHINSKI

MICHAEL F. BURNS
Attorney for Plaintiff
ORVILLE AMBURGEY

APPENDIX C

44TH CIVIL NO.
GO13222

FILED ON MARCH 12, 1992

In the Court of Appeal

FOURTH APPELLATE DISTRICT
State of California
DIVISION THREE

ORVILLE AMBURGEY *Plaintiff,*

vs.

THE CITY OF COSTA MESA, et al., *Defendants.*

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
HON. RANDALL K. WILKINSON

APPELLANT'S BRIEF

BURNS & OBLACHINSKI
MICHAEL F. BURNS
3403 Tenth Street, Suite 700
Riverside, CA 92501
(909) 781-9970
Attorneys for Plaintiff
Orville Amburgey

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MICHAEL F. BURNS
Law Offices of Burns & Oblachinski
3403 Tenth Street, Suite 700
Riverside,California 92501
714-781-9970
LAW OFFICES OF LAWRENCE K. HARVEY
Westerly Place
1500 Quail, Suite 440
Newport Beach, CA 92660
714-851-0281

Attorney for Plaintiff/Appellant, ORVILLE AMBURGEY

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

ORVILLE AMBURGEY, an individual, G013222 Plaintiff and Appellant, vs. THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS A. KATHE, City Attorney for the City of Costa Mesa, an individual; ALLAN ROEDER, City Manager for the City of Costa Mesa, and individual; MARY HORNBUCKLE; an individual, and DOES 1-100, inclusive, Defendants and Respondents.	) CASE NO:)) ORANGE COUNTY) SUPERIOR COURT) NO.; 66-92-03)) APPELLANT'S) REPLY BRIEF

I.

PLAINTIFF HAS ALLEGED A VIOLATION OF A FEDERALLY PROTECTED RIGHT

A) Plaintiff had a liberty interest:

Plaintiff has alleged a violation of a federally protected right in That his reputation has been defamed by government officials and as a result of that defamation, his ability to be employed as a city councilman in Costa Mesa or any other city has been seriously affected. The State of California recognizes employment, reputation, business goodwill and the right to hold elected office and be re-elected as significant property interests. (Cal.Gov.Code section 34882 et seq.; Willis v. Santa Ana Hosp. (962) 58 C2d 806, 26 Cal.Rptr.640.

As set out in Kaprelian v. Texas Woman's University (1975) 509 F.2d 133...

> "A liberty interest arises...when one is publicly] subjected to a badget of infamy, such as being "posted" as a drunkard. [Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed2d. 515 (1971).] In plaintff's context, it arises when an employee is able to demonstrate that the State has made a charge "that might seriously damage his standing and associations in his community" or that is of such a nature as to impose "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." [Roth, supra, 408 U.S. at 573, 92 S.Ct. at 2707.] Such a showing is the

employee's voucher of admission into the area of due process;" (ID. at 137)

Plaintiff has alleged in his proposed second amended complaint that:

> "...defendants, and each of them, infringed on plaintiff's liberty interests in that he was defamed and stigmatized as a criminal six days before the general election which resulted in the loss of a government benefit, that being employment as a city councilman for the City of Costa Mesa. Moreover, the plaintiff's chances of being an elected official in any capacity have been seriously damaged by the defendants actions in stigmatizing plaintiff's community reputation, without an opportunity to be heard or to defend the allegations." (Clerk's transcript pg. 234; paragraph 20).

Respondent's assertion that the appellant in this case must show an "entitlement" to employment before a protected interest comes into play is simply wrong. The plaintiff is required to show a right to continued employment or that he was terminated by the city. The same argument was presented in Dennis v. S & S Consolidated Rural H.S. Dist. (1978) 577 F.2d 338...

> "Essentially, S & S argues that because Dennis had no property interest in the renewal of his contract, i.e., that his right to continued employment is not recognized under Texas law, he failed to satisfy the "plus" of the "stigma-plus" test. However, the Court in Paul v. Davis anticipated the situation present in the instant case and unambiguously indicated that defamation in the course of declining to rehire a nontenured employee would satisfy the "stigma-plus" test." (ID. at 341).

The court went on to state that:

> "In other words, infliction of a stigma to reputation (or, a fortiori, by a discharge) states a claim for deprivation of liberty without due process within the meaning of the Fourteenth Amendment. Moreover, this combination of stigma plus failure to rehire/discharge states a claim even if the failure to rehire or discharge of itself deprives the plaintiff of no property interest within the meaning of the Fourteenth Amendment. We reach this conclusion because on the fact of Roth itself the Supreme Court found that the plaintiff respondent had no claim of entitlement. Roth, supra, 408 U.S. at 578, 92 S.Ct. 2701."

In the present case, the appellant had a right to continue in his quest for employment as a city councilman or other elected position without arbitrary governmental action that would alter or extinguish that right. Appellant has alleged in his proposed second amended complaint that his chances of being re-elected were significantly altered when the defendants released the defamatory statements that he was a criminal six days before the election without giving him a chance to explain, rebut, or defend his innocense. The actions taken in this case by the defendants, and the means by which they were carried out were clearly intended to eliminate the plaintiff's chances of being re-elected. In the least, they altered his position as compared to the other candidates running. The citizens thought he was a criminal!

When a state holds out a right to citizens to engage in an activity on equal terms with others, a state recognized status exists. Medina v. Rudman 545 F.2d 244 (1st Cir. 1976). That includes running for political office, holding a job, or enjoying a successful business reputation. As set out in the Dennis case:

> "It is the individual's status as a government employee and not his property interest in continued employment which furnishes the "plus" that raises reputation to the level of a constitutionally protected liberty interest." (ID. at 343).

Moreover, the defendants in this case defamed the plaintiff by making accusations that in carrying out his duties as a city councilman he acted in a manner to benefit himself. Defendants accused the plaintiff of engaging in criminal conduct for his own personal gain while carrying out his official duties. These allegations were totally false and without merit. This type of defamation damaged not only the plaintiff's personal reputation but also his business reputation and the goodwill which he had previously established as an honest city councilman.

This type of defamation clearly satisfies the stigma-plus test. As et ou in -Marreno v. City of Hialeah (1980) 625 F.2d 499:

> "...the stigma-plus requirement of Paul has been satisfied: the defamation caused both injury to reputation and damage to a protected or more tangible interest. The reputational interests at stake here are the interests an individual has in being free to move about, live, and engage in his livelihood without the

burden of an unjustified label of infamy. When the government impairs those interests by leveling defamatory charges of a kind which also inescapably harm an individual's protected business interests, the reputational interests rise to the level of liberty interests and the fourteenth amendment demands no less than full compliance with due process of the law." (ID. at 516).

The actions taken by the defendants in this case are strikingly siilar to the facts set out in Owen v. City of Independence (1980) 445 U.S. 635; 100 S.Ct. 1398. In Owen, the plaintiff was the chief of police for the city of Independence, Missouri. The city and the chief of police had previously engaged in sharp disagreements as to the running of the police department. The city council, mayor, and city manager released to the news media allegations and reports that Owen had engaged in inappropriate conduct in executing his duties as police chief that bordered on criminal conduct. The chief had been previously told he would be terminated from the department, for other reasons, by the city manager before the defaming statements were made by the city council and released to the press.

The District Court in Owen found that Owen did have a legitimate liberty interest even though the defamation made by the government officials was not the terminating cause of Owen's employment. The United States Supreme Court has an opportunity to review the Owen case on a different ground but did ratify the lower

court's finding of a liberty interest. In footnote 13, of Owen v. City of Independence, Mo. 445 U.S. 635 100 S.Ct. 1398 the court stated:

> "Although respondents did not cross petition on this issue, they have raised a belated challenge to the Court of Appeals' ruling that petitioner was deprived of a protected "liberty" interest. See Brief for Respondents 45-46. We find no merit in their contention, however, and decline to disturb the determination of the court below.
>
> Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510 27 L.Ed.2d 515 (1971), held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." In Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972), we explained that the dismissal of a government employee accompanied by a "charge against him that might seriously damage his standing and associations in this community" would qualify as something "the goverment is doing to him," so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name. In the present case, the city-through the unanimous resolution of the City Council-released to the public an allegedly false statement impugning petitioner's honesty and integrity. Petitioner was discharged the next day. The Council's accusations received extensive coverage in the press, and even if they did not in point of fact "cause" petitioner's discharge, the defamatory and stigmatizing charges certainly "occur[red] in the course of the termination of employment." Cf. Paul v. Davis, 424 U.S. 693, 710, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 45 (1976). Yet the city twice refused petitioner's request that he be given written specification of the charges against him and an opportunity to clear his name. Under the Court of Appeals correctly concluded that the city's actions deprived petitioneer of liberty without due process of law."

It is clear from the defendants actions that they wanted the

plaintiff removed from office. They couldn't fire him or terminate him, but they could defame him in the public's eye to eliminate his chance of winning re-election. That is exactly what they did! They carried out a secret investigation with false allegations of criminal behavior and then released those allegations to the press six days before the general election. The defendants in commiting these acts denied the plaintiff his liberty by eliminating his chances to compete in a fair election on an equal footing as the other candidates. He was branded a criminal in the hopes that he would not be re-elected.

B) Plaintiff was denied due process:

The plaintiff was denied due process by the defamatory actions taken by the defendants and was not given an opportunity to defend his name prior to the statements being released to the public. The denial of due process resulted in the loss of plaintiff's liberty interest.

The requirements of Procedural Due Process apply to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents v. Roth 408 U.S. 564; 92 S.Ct. 2701; 33 L.Ed.2d 548 (1972). As set out in Dennis v. S & S Consolidated, 577 F.2d 338 (1978)...

> "Where, for example, the State has conferred a right upon certain citizens-the right of adults to purchase liquor in

> Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971) or the right of licensed drivers to operate a vehicle on state highways in Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971)-it may not alter or extinguish that right without due process. Similarly, when the government employs an individual, it may not terminate the relationship in a manner which "might seriously damage his standing and associations in his community" or foreclose "his freedom to take advantage of other employment opportunities" without affording him "a due process hearing at which he can make a fair fight to clear his name." (ID. at 342-43).

In the present case, the plaintiff was never given an opportunity to clear his name. As a result, his chance for future employment is still hampered.

Defendants argument that the plaintiff is attempting to make a state law case into a federal case clearly does not hold water. First there is no clear state court remedy, this has been alleged in plaintiff's proposed second amended complaint. (Clerk's Transcript 234-35; paragraph 21). The United States Supreme Court has stated:

> "Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.s. 545, 552, 85 S.Ct. Parratt v. Taylor (1981) 451 U.S. 540; 101 S.Ct. 1908, 1915.

There are no procedural safeguards set out by the State to provide a hearing to prevent the actions taken by the defendants in this

case. Moreover, there are no post deprivation hearings to correct the actions taken by the defendants. This has also been alleged in the plaintiff's complaint. (Clerk's Transcript page 235, paragraph 21).

To argue that this case is a "font" of tort law to be superimposed on the States is ridiculous. As set out in Zinermon v. Burch 110 S. Ct. 975 (1990)...

> "In Monroe, this Court rejected the view that section 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes or Constitution, or are torts under the State's common law. It explained that section 1983 was intended not only to "override" discrminatory or otherwise unconstitutional state laws, and to provide a remedy for violations of civil rights "where state law was inadequate," but also to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." Id., at 173-174, 81 S.Ct., at 476-77. The Court said:
>
> > "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Id. at 183, 81 S.Ct., at 481.
>
> Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under section 1983. (ID. at 982)."

No procedural safeguards were in place prior to the defendants actions and no action has been taken since to allow him the opportunity

to clear his name. Consequently, his name has been stigmatized without an opportunity to rebut the allegations.

II.

THE DEFENDANTS ARE NOT ENTITLED TO

ABSOLUTE IMMUNITY

A) The City of Costa Mesa

The City of Costa Mesa is not entitled to absolute immunity. Defendant attempts to bootstrap its immunity to the alleged immunity of its officials by citing California Government Code section 815.2. The defendant's claim that it cannot be liable for any act or injury committed by an employee who is immune is clearly incorrect. The United States Supreme Court set aside such immunity in Owen v. City of Independence (1980) 445 U.S. 621; 100 S.Ct. 1398.

The court stated that there is not traditional immunity for municipal corporations and neither history nor policy supports the granting of qualified immunity. The court went on to hold that "the municipality may not assert the good faith of its officers or agents as a defense to liability under section 1983. (ID. at 1409).

B) The City Attorney

The city attorney is not entitled to absolute immunity because he

was acting as a investigator not as a prosecutor. The Briggs case clearly distinguished the immunity coverage issue limiting it to only prosecutorial functions. The Briggs v. Stafford (D.C. Cir. 1977) 569 F.2d 10 court stated:

> "Regardless of his official status, a prosecutor functioning primarily as an investigator should be accorded only the qualified immunity typically conferred on other investigative officers. The crucial inquiry concerns the nature of the official behavior challenged, not the identity or title of the officer responsible therefor." (ID. at 21).

The rationale set out in Briggs is also found in Ames v. Vavreck (1973) 356 F.Supp 931 wherein the court stated:

> "Although a prosecutor is immune from suit for actions taken within the scope of his official capacity as prosecutor, he will be held liable for civil damages if his actions are of a police/investigative or other similar nature and deprive plaintiffs of Constitutional rights." (ID. at 937).

Plaintiff has alleged facts in his proposed second amended complaint that clearly indicate that he was acting as an investigator, not a prosecutor. Those facts include the reviewing of files, taking statements, interviewing witnesses, and directing others to do the same. (Clerk's Transcript page 232, paragraphs 9 and 10). These are clearly investigative acts.

C) Defendant's Hornbuckle and Roeder

The defendants, Hornbuckle and Roeder are not entitled to

immunity because neither was acting in a legislative capacity. Instead, both individuals removed themselves from the legislative capacity by aiding and assisting in the investigative and dissemination of false information against the plaintiff. The acts were done with a purely private interest in mind, that being the elimination of the plaintiff as a city councilman. As such they do not qualify for immunity. As stated in Trevino v. Gates (1992) 798 F.Supp 621, 623...

> "Although a good and necessary rule, however, the rule that legislators have absolute immunity for their acts is not without drawbacks. Its consequence is that while cloaked with immunity, a legislator can deliberately and willfully inflict grievous injury on anyone, without any color of law, and he cannot be sued. Naturally, therefore, the mere fact that a person happens to be a legislator does not render him absolutely immune from suit for any of his acts. Legislators still must pay their bills, and comply with the speed laws. They are no more free than anyone else to assault people on the street."

In the present case, the defendants have intentionally harmed the plaintiff by disseminating false information about him and under the Ninth Circuit's analysis they should not be entitled to absolute immunity.

III.

THE COURT HAS THE DISCRETION

TO INCORPORATE A JUDGMENT OF DISMISSAL

IN THE ORDER SUSTAINING THE DEMURRER

An order sustaining a demurrer without leave to amend is not an appealable

order. However, several courts have allowed an appeal to proceed for the sake of judicial economy. As set out in Nowlon v. Koram Ins. Center (1991) 1 CA4th 1437...

> "An order sustaining demurrers without leave to amend is not an appealable order. (Code Civ. Proc., section 904.1; Munoz v. Davis (1983) 141 Cal.App.3d 420, 431 [190 Cal.Rptr. 400].) In this case, however, the substantive issued on appeal have been fully briefed by both parties. In the interests of justice and to prevent unnecessary delay, we deem the order sustaining the demurrer as incorporating a judgment of dismissal and treat Nowlon's notice of appeal as applying to the dismissal." (ID. at 1440).

The same rationale was set out in Munoz v. Davis (1983) 141 CA3d 420.

The appellant in the present case, requests that the court incorporate an order for judgment in the order sustaining the demurrers by the lower court.

IV.

CONCLUSION

Appellant respectfully requests that this court set aside the Superior Court's order sustaining the defendant's demurrers and allow the plaintiff's proposed second amended complaint to be filed. Further, that the court find that the appellant has stated a cause of action under section 1983, that the defendants are not absolutely

immune and that there was an attorney-client relationship between appellant and attorney Kathe.

DATED: March 12, 1993

Respectfully submitted,

MICHAEL F. BURNS
Attorney for Plaintifff,
ORVILLE AMBURGEY

APPENDIX D

FILED ON JUNE 23, 1992

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

ORVILLE AMBURGEY, an individual, Plaintiff, v. THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS A KATHE, City Attorney for the CITY OF COSTA MESA, an individual; MARY HORNBUCKLE, Mayor of the CITY OF COSTA MESA, an individual; ALLAN ROEDER, City of Manager for the City of COSTA MESA, an individual; and DOES 1-100, inclusive, Defendants.	CASE NO. 66 92 03 JUDGE RANDELL L. WILKINSON DEPT: 19 STATEMENT OF DECISION

The HONORABLE RANDELL L. WILKINSON, Judge, submits the following Statement of Decision relating to Court order that Defendants MARY HORNBUCKLE, Mayor of THE CITY OF COSTA MESA (hereinafter "HORNBUCKLE"), as an individual, and ALLEN

ROEDER, City Manager for the CITY OF COSTA MESA, as an individual (hereinafter "ROEDER") demurrer to Plaintiff's First Amended Complaint be sustained without leave to amend.

Based on the papers submitted and oral argument offered in relation to HORNBUCKLE and ROEDER's Demurrer to Plaintiff's First Amended Complaint, it is determined and ruled with regard to Plaintiff's first cause of action, deprivation of rights under color of State law (42 U.S.C.., 1983, 1988), the Mayor and City Manager were entitled to legislative immunity for their actions taken in the course and scope of their employment, including the investigation and referral of potential criminal charges to the District Attorney in relation to AMBURGEY's activities as a city council member. Immunities applicable to the activities of HORNBUCKLE and ROEDER are discussed at length in Penny v. Brandlove, 341 U.S. 367 (1951); Lake Country Estates v. Tahoe Retional Planning Agency, 440 U.S. 391 (1979); Healey v. Town of Pembroke Park, 831 F.2d 989 (11 Cir. 1987); Aitchison v. Raffiani, 708 F.2d 96 (3rd Cir. 1983); and Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981).

In addition to these immunities, it is determined that Plaintiff's alleged wrongs did not rise to the level of a constitutional deprivation.

Instead, the activities of Defendants and the alleged injuries of Plaintiff are approximately litigated and addressed by the laws of the State of California. McCarthy v. Mao, 827 F.2d 1310 (9th Cir. 1987).

The conduct of HORNBUCKLE and ROEDER, for which Plaintiff bases causes of action five (slander) and six (liable) are subject to absolute immunity under California Civil Code, Section 47. Since all of the activities of Defendants for which Plaintiff complains were performed within the course and scope of their employment as Mayor and City Manager of the CITY OF COSTA MESA, it is concluded that California Civil Code, Section 47 applies in full. Additionally, it is recognized that even where allegations of malice are asserted against the Mayor and the City Manager, they are entitled to the absolute privilege of Civil Code, Section 47(a); O'Shea v. General Telephone Company (1987), 193 C.A.3d 1040, 238 Cal.Rptr. 715; Abraham v. Landcaster Community Hospital (1990), 217 CA.3d 836, 266 Cal.Rptr. 360; Williams v. Taylor (1982), 129 CA.3d 745, 181 Cal.Rptr. 4233.

It is further held these same immunities apply equally to Plaintiff's fourth, sixth, and seventh causes of action in that where Defendants are entitled to absolute immunity for their official duties, any causes of action stemming therefrom are subject to the absolute privilege

afforded to Defendants and thus barred.

Based on the above reasoning and following consideration of the papers submitted, and oral argument heard on behalf of all interested parties, it is ordered that Defendants HORNBUCKLE and ROEDER's demurrer to Plaintiff's First Amended Complaint be sustained. Noting that the applicable immunities apply in full, Plaintiff is prohibited from stating any cause of action against said Defendants. For that reason, the motion to sustains said demurrer is granted without leave to amend.

IT IS SO ORDERED.

_____

JUDGE RANDELLL WILKINSON

FILED ON JULY 10, 1992

LAW OFFICES OF EDWIN J. RICHARDS & ASSOCIATES
1055 North Main Street, Suite 922
Santa Ana, California 92701
(71) 558-7447

Edwin J. Richards
Michael M. McMahon

Attorneys for Defendants,
CITY OF COSTA MESA and THOMAS A. KATHE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

ORVILLE AMBURGEY, an individual, Plaintiff, v. THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS A. KATHE, City Attorney for the CITY OF COSTA MESA, an individual; MARY HORNBUCKLE, Mayor of the City of Costa Mesa, an individual; ALLAN ROEDER, City of Manager for the City of Costa Mesa, an individual; and DOES 1-100, inclusive, Defendants.	CASE NO. 669203 ASSIGNED FOR ALL PURPOSES TO: JUDGE: RANDALL L. WILKINSON DEPT. 19 STATEMENT OF DECISION REGARDING DEMURRER OF DEFENDANTS CITY OF COSTA MESA, AND THOMAS A. KATHE (Filed concurrently with Motion to Strike Portions of Plaintiff's Complaint and Request for Judicial Notice) DATE: December 31, 1991 TIME: 9:30 a.m. DEPT: 19

After presentation of oral and documentary evidence regarding the demurrer of defendants City of Costa Mesa and Thomas A. Kathe to the first amended complaint Orville Amburgey, the court renders its decision as follows:

1. Plaintiff's first cause of action fails to state a cause of action against defendant Thomas A. Kathe because he is absolutely immune for actions taken in his prosecutorial capacity under Imbler v. Pachtman, 424 U.S. 409 (1976).

2. Plaintiff's first cause of action fails to state a cause of action against defendants City of Costa Mesa and Thomas A. Kathe because plaintiff fails to allege violation of a constitutionally protected right and fails to allege that state laws are inadequate to remedy his wrongs.

3. Plaintiff's first cause of action fails to state a cause of action against defendant City of Costa Mesa because plaintiff fails to identify an official municipal policy or custom that allegedly deprived plaintiff of his constitutional rights.

4. Plaintiff's second and third causes of action, against defendant Thomas A. Kathe only, fail to state a cause of action because plaintiff and Thomas A. Kathe did not have an attorney-client relationship.

5. Plaintiff's second through eighth causes of action fail to state

causes of action against defendant Thomas A. Kathe because he is absolutely immune from liability under Government Code section 821.6 and Civil Code section 47.

6. Plaintiff's fourth through eighth causes of action fail to allege causes of action against defendant City of Costa Mesa because the city is absolutely immune from liability under Government Code section 815.2.

DATED: _____, 1992

_____
RANDELL L. WILKINSON
JUDGE OF THE SUPERIOR COURT

APPENDIX E

FILED ON JUNE 16, 1993

LAW OFFICES OF BURNS & OBLACHINSKI
3403 Tenth Street, Suite 700
Riverside, California 92501
714-781-9970
LAW OFFICES OF LAWRENCE K. HARVEY
Westerly Place
1500 Quail, Suite 440
Newport Beach, California 92660
714-851-0281

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

ORVILLE AMBURGEY, an individual, Plaintiff, v. THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS KATHE, City Attorney for the CITY OF COSTA MESA, an individual; MARY HORNBUCKLE, Mayor of the CITY OF COSTA MESA, an individual; ALLAN ROEDER, City of Manager for the City of COSTA MESA, an individual; and DOES 1-100, inclusive, Defendants.	CASE NO. 669203 PROPOSED SECOND AMENDED COMPLAINT 1. Deprivation of Rights Under Color of State Law [42 U.S.C. sec. 1983, 1988] 2. Legal Malpractice 3. Breach of Fiduciary Duty

Plaintiff alleges:

1. This is an action for deprivation of constitutional rights under color of state law brought pursuant to the recodification section 1979 of the Civil Rights Act of 1971, Title 42 United States Code, Section 1983, for remedies for defendant's deprivation of plaintiff's civil rights. Plaintiff, ORVILLE AMBURGEY, alleges that defendants have deprived plaintiff of a protected right in that they have denied him due process, loss of a liberty interest, loss of a property right in the form of employment, attached a stigma to his name without due process which resulted in loss of employment.

By this action plaintiff seeks all legal and equitable relief to which he may be entitled, including, but not limited to compensatory and punitive damages, attorney's fees and costs, prejudgment interest, and injunctive relief against all defendants individually and in their office capacities.

2. At all times herein mentioned, plaintiff was and now is a citizen of the United States, and resides in the City of Costa Mesa, Orange County, California. All acts alleged herein occurred within the County of Orange.

3. At all times hereinafter mentioned, Defendant COSTA

MESA was a municipal government and Defendant THOMAS KATHE was the City Attorney for said city: MARY HORNBUCKLE was Mayor/Councilwoman for said city; and ALLAN ROEDER was the City Manager for said city.

In doing all of the things hereinafter mentioned acted under color of their authority as such, under color of their authority as such, under color of the statutes, ordinances, regulations, customs, and usages of the State of California, the City of Costa Mesa and pursuant to the official policy of defendant municipality as created by the Mayor, City Attorney, and/or City Manager acting under color of their authority.

4. At all times mentioned herein, plaintiff, was a City Councilman for the City of Costa Mesa, California employed and paid by said city as an elected official. At the time of the defendant's actions, plaintiff was a candidate for re-election to continue his employment with said city.

5. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-100, inclusive, and therefore, sues those defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. However, plaintiff is informed and believe that each of the fictitiously

named defendants is responsible for plaintiffs damages herein.

6. In or about October 1990, defendants, and each of them, began an investigation of plaintiff with regard to an alleged conflict of interest between plaintiff, as city councilman, and Copley Colony, the official cable franchise operator under contract with the City of Costa Mesa.

7. Defendants alleged that plaintiff violated Government Code sections by voting on the approval of Copley Colony's contract with the City of Costa Mesa; and that plaintiff had a financial interest in Copley Colony Cable.

8. On or before October 1990, Defendant, THOMAS KATHE, the City Attorney for Costa Mesa, took it upon himself to begin an investigation of plaintiff's business dealings with Copley Colony Cable.

9. Defendant KATHE's investigation and acts included, but were not limited to the following, he reviewed city documents; files; records and minutes to establish a conflict of interest. KATHE also interviewed witnesses, took statements, and directed others to do the same under his supervision, and authored confidential memorandums to other City Council members as to the progress of his investigation.

10. At the conclusion of his investigation, Defendant KATHE met with Defendant HORNBUCKLE, and other council members either individually or as a group to discuss the conclusions of Defendant KATHE's investigation.

11. Defendant, KATHE, violated city policy by investigating suspected criminal activity, which by city policy was delegated to the Costa Mesa Police Department. A copy of said policy is attached hereto, marked EXHIBIT "C," and incorporated herein by reference.

12. Moreover, Defendant KATHE, did not act in a prosecutorial capacity pursuant to city policy in that he was investigating alleged criminal conduct as opposed to initiating legal actions to enforce violations of law as set out in the city's policy. A copy of city policy for City Attorney is attached hereto, marked EXHIBIT "D," and incorporated herein by reference.

13. During the course of KATHE's investigation, KATHE disclosed his findings with Defendants ALAN ROEDER, MARY HORNBUCKLE, and DOES 1-10. During their discussions, KATHE represented to others that plaintiff had violated certain Government Code sections which constituted a felony under California law.

14. On or about October 15, 1990, defendants, and each of

them, either collectively or as individuals, met and conducted City Council business in determining to submit the results of Defendant, KATHE's, investigation to the District Attorney for prosecution and to release to the Press information that plaintiff had committed a felony while acting as a City Councilman.

15. The meetings held by defendants were in direct violation of the Brown Act and Government Code sections 54950 through 54961 in that the failed to call an official or public meeting to discuss the forwarding of the allegations to the District Attorney, nor did they advise plaintiff, Councilman, of the business being conducted or subject matter of the meetings or investigations.

16. In or about June of 1989, Defendant, ROEDER, prepared official city documents which he knew or should have known were false in that they falsified official government action which resulted in the allegations being raised against plaintiff of a conflict of interest. Defendant, ROEDER, acted with Defendant, KATHE, in producing these false documents to prove a conflict on the part of the plaintiff and subsequently forwarded them to the District Attorney and Press representing them as accurate.

17. Defendants knew or should have known that plaintiff did

not engage in a conflict of interest in his official capacity as a City Councilman. However, defendants and each of the concealed said allegations from plaintiff denying him the right to due process in defending his innocence and explaining his actions in a City Council hearing or otherwise.

18. Instead, defendants, and each of them, released the falsified information to the Press on or about October 30, 1990 six days prior to the general election in which plaintiff was attempting to be re-elected and continue in his employment with the City of Costa Mesa.

19. Defendants never advised plaintiff of the allegations, nor did they allow him to dispute the allegations prior to the release to the Press six days prior to the general election.

20. In doing the aforementioned acts, defendants, and each of them, infringed on plaintiff's liberty interests in that he was defamed and stigmatized as a criminal six days before the general election which resulted in the loss of a government benefit, that being employment as a city councilman for the City of Costa Mesa. Moreover, the plaintiff's chances of being elected official in any capacity have been seriously damaged by the defendants actions in stigmatizing plaintiff's community reputation, without an opportunity to be heard or to defend the

allegations.

21. Plaintiff alleges that there are no adequate state remedies to warrant a state claim. Further, that the deprivation in this case was a result of a city policy to hold meetings in violation of the Brown Act and the policy of releasing false information without allowing the subject of those accusations due process ratified by elected officials of the City. These acts by city officials were neither random nor unauthorized and do not have pre-deprivation due process safeguard procedures.

22. As a proximate result of defendants' action against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff was subjected to humiliation and indignity, and prevented from transacting his business, and suffered great physical and mental pain and suffering, all to his damage in an amount to be proved at trial.

23. The above-recited actions of the defendants in depriving plaintiff of his constitutionally protected rights were done with evil motive or intent, or with reckless or callous indifference to plaintiff's rights in that the manufacturing and fabrication of the false evidence and presentation of that false evidence to the District Attorney in and for the County of Orange and was done specifically with the intent to injure plaintiff and damage his reputation and chances to be re-elected to the

City Council.

24. On or about July 5, 1991, the plaintiff filed a written claim against the City of Costa Mesa pursuant to California Government Code section 910-946.6. A true and correct copy of that claim is attached to this complaint, incorporated by reference as if fully set forth herein, and labeled EXHIBIT "A."

25. On or about July 9, 1991, the Defendant, CITY OF COSTA MESA, wrongfully rejected the plaintiff's written claim for damages on the basis that it was not timely filed. Plaintiff hereby alleges that the written claim for damages, see attached EXHIBIT "B," was timely filed and was wrongfully rejected by the City of Costa Mesa, California.

SECOND CAUSE OF ACTION

LEGAL MALPRACTICE

[AGAINST THOMAS A. KATHE ONLY]

26. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 25 above, as though fully and completely set out herein.

27. Plaintiff, at all relevant times hereinafter mentioned, was a duly elected City Councilman in and for the City of Costa Mesa,

California and therefore entitled to all of the rights, benefits and duties pertaining thereto.

28. The Defendant THOMAS A. KATHE, at all relevant times hereinafter mentioned, was and is the duly appointed City Attorney in and for the City of Costa Mesa, California. In said position Defendant, KATHE, agreed and accepted to represent the City of Costa Mesa in and for the benefit of the City Council members as a group and individually.

29. Defendant THOMAS A. KATHE is, and at all relevant times herein mentioned, was an attorney at law licensed to practice before all courts of the State of California and was engaged in the practice of law in his capacity as the City Attorney for the City of Costa Mesa, California, and having his principal place of business at the city of Costa Mesa, California.

30. At all relevant times herein mentioned, the Defendant THOMAS A. KATHE's duties as the City Attorney in and for the City of Costa Mesa, California was to advise the City, and its City officials, such as the plaintiff, as to the nature and extent of their legal rights pursuant to Government Code section 41801 and by the undertaking of the Defendant THOMAS A. KATHE in representing the City of Costa

Mesa and its City officials, including the plaintiff. Defendant, KATHE, agreed to represent the City of Costa Mesa, California and it's officers by accepting employment as the City Attorney of the City of Costa Mesa, California, and had a duty to perform such services for the City of Costa Mesa, California, including such services for the plaintiff as a City Councilman.

31. On or about October 12, 1990, the Defendant, THOMAS A. KATHE, failed to exercise reasonable skill and care in undertaking to perform such legal services for the plaintiff and negligently and carelessly failed to advise the plaintiff that a conflict of interest existed between the Defendant KATHE and the plaintiff. Defendant, KATHE, breached his duty to plaintiff by failing to disclose to plaintiff that he was in the process of performing an investigation targeting the plaintiff as a defendant in a criminal action. Moreover, that KATHE was egaged in a conspiracy to falsely fabricate and manufacture evidence to be delivered to the District Attorney in and for the County of Orange, California, and would be used to allow the District Attorney in and for the County of Orange, California to bring the charges hereinabove mentioned against the plaintiff.

32. Had Defendant KATHE exercised proper skill and care in the foregoing matter, the plaintiff would have been properly advised of the conflict of interest and would have had the matter investigated and would have been able to alleviate the subsequent damages by proving the falsity of said allegations prior to the November 1990 City Council election and all the emotional pain, suffering and trauma had the plaintiff known the true facts concerning the conflict of interest.

33. As a proximate result of such negligence, the plaintiff has been damaged in an amount to be proven at the time of trial.

34. Plaintiff did not discover the negligence of the Defendant THOMAS

A. KATHE until May 22, 1991 when Plaintiff received discovery from the District Attorney in and for the County of Orange, California which documented the negligence and involvement of the Defendant THOMAS A. KATHE. Plaintiff through reasonable diligence could not have discovered the negligence of the Defendant THOMAS A. KATHE any sooner.

THIRD CAUSE OF ACTION

BREACH OF FIDUCIARY DUTY

[AGAINST DEFENDANT THOMAS A. KATHE ONLY]

35. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 34 above, inclusive, as though fully and completely set forth herein.

36. As an attorney at law, the Defendant THOMAS A. KATHE owed a fiduciary duty to his client, plaintiff.

37. The Defendant, THOMAS A. KATHE, breached his fiduciary duty to the plaintiff in that the defendant failed to inform the plaintiff of the above described conflict of interest and of the involvement of the defendant in the herein alleged conspiracy to violate plaintiff's Civil rights. Plaintiff alleges that the above mentioned breach of fiduciary duty by the Defendant THOMAS A. KATHE was intentional, willful, and performed with a conscious disregard of the plaintiff's rights. Defendants' conspiracy was undertaken intentionally or with reckless disregard for plaintiff's rights, in a manner that was malicious, willful, and

oppressive, and for which conduct plaintiff claims punitive damages against all defendants except CITY and compensatory damages against

all defendants.

FIRST CAUSE OF ACTION

[DEPRIVATION OF RIGHTS UNDER COLOR OF STATE LAW]

[42 U.S.C. SECTIONS 1983, 1988]

1. For general damages in an amount to be proven at the time of trial;

2. For medical damages in an amount to be proven at the time of trial;

3. For punitive damages, as against all defendants except the City of Costa, California, in a amount appropriate to punish the defendants for their wrongful conduct and set an example for others;

4. For reasonable attorney's fees pursuant to Title 42 of the United State Code section 1988;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem just and proper.

SECOND CAUSE OF ACTION

[AGAINST DEFENDANT THOMAS A. KATHE]

[LEGAL MALPRACTICE]

1. For general damages in an amount to be proven at the

time of trial;

2. For special damages to be proven at the time of trial;

3. For costs of suit herein incurred;

4. Such other and further relief as the court may deem just and proper.

THIRD CAUSE OF ACTION

[AGAINST DEFENDANT THOMAS A. KATHE]

[BREACH OF FIDUCIARY DUTY]

1. For general damages in the amount to be proven at the time of trial.

DATED: June 15, 1992

/s/
MICHAEL F. BURNS
Attorney for Plaintiff

DECLARATION OF MICHAEL F. BURNS

I, MICHAEL F. BURNS, declare:

1. That I am an attorney duly authorized and licensed by the State of California to practice in all courts of said state. I am the attorney representing plaintiff herein.

2. On June 13, 1992, I reviewed the City of Costa Mesa program and budget for 1990-1991 which sets forth the City's programs and the policy for the City for each programs.

3. In reviewing the City's procedures it is clear that the City policy for the City Attorney and the Police Department are separate and entirely different. The policy is for the Police Department to investigate criminal activity and the City Attorney is to initiate legal proceedings and to prosecute such conduct.

4. The City's policy does not refer to the City Attorney as an investigative agency nor does it empower it as such.

5. In addition, the plaintiff in this case met with councilperson, Sandra Genis, since the court's ruling on the demurrer, and has learned that the Defendant, MARY HORNBUCKLE, never discussed MR. KATHE's report or investigation with Ms. Genis prior to releasing it, six days before the election, to the Press.

6. All of these facts are new and have not been alleged in previous complaints and were not discovered until after the hearing on the demurrer.

Supreme Court, U.S.
FILED
AUG 16 1994
OFFICE OF THE CLERK

No. 94-142

In The

Supreme Court of the United States

October Term, 1994

ORVILLE AMBURGEY,

Plaintiff-Petitioner,

vs.

THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS A. KATHE, City Attorney for the City of Costa Mesa, an individual; ALLAN ROEDER, City Manager for the City of Costa Mesa, an individual; MARY HORNBUCKLE, an individual; and DOES 1-100, inclusive,

Defendant-Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION

LAW OFFICES OF EDWIN J. RICHARDS & ASSOCIATES
1055 North Main Street
Suite 922
Santa Ana, CA 92701
714-558-7447

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. WHETHER PETITIONER AMBURGEY HAS STANDING BEFORE THE U.S. SUPREME COURT AND HAS PRESENTED A JUSTICIABLE CASE OR CONTROVERSY UNDER FEDERAL LAW OR HAS, INSTEAD, INAPPROPRIATELY REQUESTED ADVISORY OPINIONS AND REVIEW OF NON-FEDERAL ISSUES ADEQUATELY DECIDED ON STATE LAW GROUNDS.

II. WHETHER THE CALIFORNIA COURTS CORRECTLY FOUND THAT COSTA MESA CITY ATTORNEY KATHE WAS ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY PURSUANT TO FEDERAL LAW.

III. WHETHER THE CALIFORNIA COURT CORRECTLY FOUND THAT PETITIONER DID NOT PRESENT ANY RECOGNIZED CIVIL RIGHTS VIOLATION UNDER FEDERAL LAW.

IV. WHETHER THE CALIFORNIA COURTS CORRECTLY FOUND THAT THE COSTA MESA CITY MAYOR AND CITY MANAGER WERE ENTITLED TO ABSOLUTE LEGISLATIVE IMMUNITY UNDER FEDERAL LAW.

V. WHETHER THE ISSUE OF AN ATTORNEY-CLIENT RELATIONSHIP BETWEEN PETITIONER AND THE COSTA MESA CITY ATTORNEY INAPPROPRIATELY PRESENTS A NON-FEDERAL ISSUE ADEQUATELY DECIDED ON INDEPENDENT STATE GROUNDS.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the CITY OF COSTA MESA[1], a Municipal Corporation THOMAS A. KATHE, City Attorney for the City of Costa Mesa, ALLAN ROEDER, City Manager for the City of Costa Mesa, and MARY HORNBUCKLE, Mayor of the City of Costa Mesa respectfully pray that petitioner ORVILLE AMBURGEY's Petition for Writ of Certiorari be denied.

STATUTES AND REGULATIONS INVOLVED[2]

28 U.S.C. 1257
42 U.S.C. 1983
42 U.S.C. 1988
California Government Code § 815.2
California Government Code § 41801
California Government Code § 41805
California Government Code § 42803.5
California Government Code § 87100
California Government Code § 87103
California Government Code § 91000
California Government Code § 91991.5
Costa Mesa Municipal Code § 2-401
Costa Mesa Municipal Code § 2-408
Costa Mesa Municipal Code § 1-33

[1] Respondent CITY OF COSTA MESA has no parent or subsidiary companies to be listed pursuant to Supreme Court Rule 29.1.

[2] Text of statutes and municipal codes are fully set forth in Appendix F, attached hereto.

STATEMENT OF THE CASE

1. Factual Background

Petitioner's recitation of the factual setting of this matter contains numerous extraneous, highly inflammatory facts not presented to the California Courts. The facts before the California courts, respectively, were as follows:

On or about October 1990, City Attorney Thomas Kathe was requested, pursuant to the authority vested in him by state and municipal codes, to undertake an investigation of petitioner City Council member Orville Amburgey's business dealing with a company known as Copley Colony Cablevision, Inc. Copley Colony Cablevision, Inc. was the official cable franchise operator for the City of Costa Mesa. It was suspected that petitioner City council member Amburgey, owner of Amburgey Electric, had voted on approval of a Copley Colony contract while having a financial interest in Copley Colony Cablevision, Inc. in violation of the Political Reform Act of 1974, *California Government Code* §§ 87100 et seq. (Petition, p. A-69).

The investigation undertaken by City Attorney Kathe involved review of City documents, files, records, and minutes. Witnesses were interviewed and statements were taken. The City Council was intermittently briefed on the progress of the City Attorney's findings. (Petition pp. A-69-70).

As a result of the investigation, it was concluded that petitioner had violated *California Government Code* sections which constituted a felony under California law.

(Petition p. A-70). It was decided to refer the matter to the District Attorney for prosecution as a felony as the City Attorney was only authorized to prosecute misdemeanors. In the process of transferring the information to the District Attorney, the case was released to the press. (Petition p. A-72). At the next election, petitioner Amburgey was voted out of office by the citizens of the City of Costa Mesa.

Subsequent to the election, a criminal complaint was filed by the District Attorney but was later dismissed prior to trial.

2. Procedural Background

Petitioner thereafter filed a complaint for damages in the Superior Court of the State of California alleging that the acts of respondents infringed on plaintiff's liberty interests as he claimed he was defamed and stigmatized prior to the general election which resulted in the loss of an alleged governmental benefit in the form of his City Council seat. (Petition. p. A-72).

Petitioner brought his cause of action for civil rights violation under federal law (42 U.S.C. §§ 1983, 1988) contending there were no adequate state remedies. (Petition p. A-73).

Petitioner further brought a cause of action for legal malpractice against the City Attorney Kathe, alleging that the City Attorney's duties were to advise the City, and its City officials, regarding their legal rights pursuant to the *California Government Code* § 41801. Petitioner, however, alleged that a conflict of interest existed between the City

Attorney and petitioner because the City Attorney was conducting a review of petitioner's business dealings with Copley Colony. (Petition p. A-76). In a separate cause of action, petitioner alleged breach of a fiduciary duty owed to Petitioner by City Attorney Kathe. (Petition p. A-78). Petitioner alleged other causes of action not at issue herein.

Respondents filed a demurrer to Amburgey's first complaint. Respondents' demurrer was sustained with leave to amend. Petitioner then filed an amended complaint alleging the same causes of action with minor variations. Respondents again demurred to the amended complaint. Respondents demurrer was again sustained, this time without leave to amend. The court specifically found that Amburgey's civil rights cause of action failed to allege violation of a federally protected right. The Court also found that City Attorney Kathe was entitled to absolute immunity from any civil rights cause of action as he was acting completely within his prosecutorial capacity. Similarly, the court found that respondents City Mayor Hornbuckle and City Manager Roeder were entitled to absolute legislative immunity. The court further ruled that the causes of action for legal malpractice and breach of a fiduciary duty failed to state a cause of action as City Attorney Kathe did not have an attorney client relationship with Amburgey.

Dissatisfied with the trial court's ruling, petitioner Amburgey filed a motion for reconsideration with a proposed second amended complaint. The trial court reconsidered its ruling and reaffirmed.

Petitioner Amburgey then filed a notice of appeal to the Court of Appeal for the State of California Fourth Appellate District, Division Three, alleging the lower court erred in finding that Amburgey did not have a federal protected right, that City Attorney Kathe was entitled to absolute prosecutorial immunity, that City Mayor Hornbuckle and City Manager Roeder were entitled to absolute legislative immunity, and that City Attorney Kathe did not have an attorney client relationship with Amburgey.

Although the appeal was taken from a non-appealable order, the Court of Appeal deemed the order sustaining the demurrer to incorporate a later judgement of dismissal entered by the trial court and treated the notice of appeal as being taken therefrom. Respondents thereafter filed respondents' brief (Appendix B) stating that Amburgey had failed to allege deprivation of a right, immunity or privilege guaranteed under federal law as required to state a cause of action under 42 U.S.C. § 1983 as set forth in *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Respondents further emphasized that Amburgey's contentions that he had a property right in employment as an elected City council member was erroneous as a mere subjective expectancy of employment does not qualify as an "entitlement" under federal law pursuant to *Jones v. Hopper,* 410 F.2d 1329 (10th Cir. 1969). Additionally, the right to be free from damage to reputation claimed by petitioner was likewise meritless as this is not a constitutionally protected liberty or property interest without concomitant evidence of alteration of a pre-existing state right, as set forth in *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 773 (1981).

Respondents further contended that, the issue of whether City Attorney Kathe was entitled to absolute prosecutorial immunity, although relevant only *if* Amburgey demonstrated violation of a Constitutionally protected right, was clearly supported by the U.S. Supreme Court case of *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct 984, 47 L.Ed.2d 128 (1976). Likewise, the granting of absolute legislative immunity to the City Mayor and City Manager was entirely appropriate pursuant to the U.S. Supreme Court case of *Tenney v. Bradhove*, 341 U.S. 367, 379, 71 S.Ct. 783, 95 L.Ed. 1019 (1952).

On July 27, 1993 by letter brief Amburgey requested the California Court of Appeal consider the recent U.S. Supreme Court decision in *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1992), regarding the secondary issue of prosecutorial immunity of City Attorney Kathe. On August 4, 1993, respondents answered Amburgey's letter brief offering their position that the issue of absolute vs. qualified prosecutorial immunity was misplaced, as the true issue before the Court was whether or not Amburgey could allege deprivation of a state right or status under federal law (Appendix C). On October 29, 1993, the Court of Appeals ordered the matter resubmitted.

On November 18, 1993, the California Court of Appeal issued its unpublished opinion affirming the Superior Court judgment in full (Appendix A). The Court of Appeal specifically found that Amburgey's attempt to allege a cause of action for deprivation of a right under color of State law failed (Appendix A, A-6). The Court of Appeal concurred with respondents that at best Amburgey had a mere subjective expectancy of re-employment

as a City council member, not an entitlement to employment, which did not give rise to a property interest for the purpose of the due process clause under 42 U.S.C. § 1983. (Appendix A, p. 8).

Citing this Court's ruling in *Paul v. Davis*, 424 U.S. 693, 702-711, 96 S.Ct. 1155, 47 L.Ed.2d 773, the Court of Appeals held that an alleged damage to reputation, without more, does not rise to the level of a constitutional violation. Most importantly, to be actionable at all, any claimed damage to reputation must concomitantly extinguish a state law right or status, which Amburgey failed entirely to demonstrate (Appendix A, A-9). The state "right" alleged by Amburgey, that he was entitled to run for office and be employed as a City council member, was held not to be an entitlement and further was not extinguished by any acts of respondents whatsoever. Rather, by the will of the voters of the City of Costa Mesa, Amburgey was merely voted out of office. (Appendix A, A-10).

The Court of Appeals further held that this court's decision in *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128, mandated absolute immunity from civil liability for City Attorney Kathe as he was exercising his "judicial or quasi judicial discretion" at all times during the inquiry regarding Amburgey's business dealings (Appendix A, A-14).

Specifically the Court of Appeals held that Section 91001.5 of the *California Government Code* empowered City Attorney Kathe to prosecute violations of the Political Reform Act. Section 42803.5 of the same Code authorized him to prosecute misdemeanor violations occurring in the

City. Further Costa Mesa Municipal Code sections 2-401 and 2-408 mirror the *California Government Code* on conflict of interest and Section 1-33 empowered City Attorney Kathe to prosecute criminal violations of those conflict of interest provisions. The allegations of Amburgey's own complaint compelled the conclusion that City Attorney Kathe was acting as a prosecutor within these provisions entitling him to absolute prosecutorial immunity (Appendix A, A-14-15).

Citing *Tenney v. Brandhove,* 341 U.S. 367, 379, 71 S.Ct. 783, 95 L.Ed.2d 1019, the Court of Appeals held City Mayor Hornbuckle and City Manager Roeder were entitled to absolute legislative immunity for all acts undertaken by them.

Finally, the Court of Appeals concluded that City Attorney Kathe and petitioner did not have an attorney client relationship pursuant to California statutory and case law. Accordingly, Amburgey's complaint failed to state a cause of action for legal malpractice or breach of fiduciary regarding City Attorney Kathe.

Amburgey thereafter filed a petition for rehearing. Respondents filed their answer to the petition for rehearing on December 13, 1993 (Appendix D). The petition for rehearing was denied on December 16, 1993.

Amburgey then filed a petition for California Supreme Court review. Respondents filed their answer to the petition for review on January 13, 1994 (Appendix E). Amburgey's petition was denied on March 21, 1994. The instant petition for a writ of certiorari to the Supreme

Court of the United States was filed by Amburgey on July, 17, 1994.

SUMMARY OF ARGUMENT

The jurisdiction of the United States Supreme Court to review a judgment of a state court is limited to justiciable cases or controversies. Petitioner herein has not alleged deprivation of a right, immunity, or privilege guaranteed under federal law and has not set forth a recognizable injury caused by governmental action. Therefore, respondents respectfully submit petitioner lacks standing before this court as to each issue presented for review. Instead, petitioner requests an impermissible advisory opinion regarding the federal doctrine of prosecutorial immunity and legislative immunity and inappropriately requests the court issue an opinion regarding non-federal issues completely decided on adequate state law grounds.

The California Court of Appeal expressly and correctly decided that former Costa Mesa City council member Amburgey failed to present facts sufficient to allege deprivation of a right, immunity, or privilege guaranteed under federal law for an invasion of privacy or interference with a property right in his elected position of city council member. Petitioner failed to demonstrate that any loss of such a right, immunity or privilege resulted from respondent City officials' conduct in their investigation of Amburgey's possible violations of the Political Reform Act and possible felony acts while in his role as City council member.

Notwithstanding petitioner's complete failure to demonstrate deprivation of a federally recognized right, the California Court of Appeal also correctly addressed the secondary issue of prosecutorial immunity afforded respondents for all acts undertaken in pursuit of their investigation and acts initiated to protect the public from an elected official who potentially had violated *California Government Code* sections constituting a felony under California law.

Petitioner's writ here fails to present a justiciable issue as petitioner does not set forth deprivation of any right, privilege or immunity claimed under the Constitution. Instead, petitioner focuses upon an alleged misapplication of the doctrine of prosecutorial immunity and legislative immunity which are only relevant if petitioner had, in fact, been deprived of a federally protected right.

Therefore, petitioner lacks standing as the petition fails to set forth an appropriate federal interest at stake. Petitioner further impermissibly requests the Court issue an advisory opinion regarding the doctrine of prosecutorial immunity and legislative immunity and request review of state action where no party before the court has suffered or immediately faces deprivation of a federal right. For these reasons, respondents respectfully contend petitioner's writ of certiorari should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

I. PETITIONER LACKS STANDING BEFORE THIS COURT AND HAS NOT PRESENTED A JUSTICIABLE CASE OR CONTROVERSY UNDER FEDERAL LAW AND FURTHER INAPPROPRIATELY REQUESTS ADVISORY OPINIONS.

The jurisdiction of the United States Supreme Court to review a judgement of a state court is governed by 28 U.S.C. § 1257. The right of review provided by § 1257 is not unlimited, and must serve the important policy of achieving consistent decision regarding federal rights. (*Barrington v. Missouri*, 205 U.S. 483, 27 S.Ct. 582, 51 L.Ed. 890). Review of an issue under § 1257 cannot exceed the scope of Article III of the Constitution; therefore, jurisdiction to review applies only to justiciable cases or controversies. Section 1257 provides:

> "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statues of or any commission held or authority exercised under the United States."

In this instance, petitioner is required at the outset to allege the deprivation of a right, immunity or privilege guaranteed under federal law. (28 U.S.C. § 1257; *Parratt v. Taylor*, 451 U.S. 517, 535, 101 S.Ct. 527, 68 L.Ed.2d 420

(1981)). Petitioner has not set forth in his questions presented *any* deprivation of a right immunity or privilege under federal law. Instead, petitioner inappropriately focuses on respondents affirmative defenses of prosecutorial immunity and legislative immunity in this matter.

Respondents, therefore, respectfully submit petitioner lacks standing before this court. The touchstone of Article III standing is that petitioner must demonstrate an actual injury as a result of the challenged official conduct which is real and immediate and not conjectural or hypothetical. (U.S. Constitution, Art. 3, § 1 et seq.) Petitioner must have a stake in a legally redressable injury. (*Gladstone Relator v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct 1601, 1607, 60 L.Ed.2d 66 (1979)). In other words, the standing doctrine requires not only that a bona fide Constitutional claim be asserted, it requires that the litigant have suffered an injury in fact. (*Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)). Although the injury need not be economic, it must be actual or imminent. (*Lujan v. Defenders of Wildlife*, ___ U.S. ___ 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

Further, the challenged governmental action must be the cause of the alleged injury. (*Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). This requirement is strictly imposed by Article III of the Constitution. (*Simon v. Eastern Ky. Welfare Right Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)). Additionally where the petitioner asserts multiple claims, as herein, a separate analysis of standing is required as to each claim asserted. (*Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)).

As early as 1867, it was recognized that to afford the basis for U.S. Supreme Court review, not only must there be a federal question presented, the federal question must be substantial. (*Millingar v. Hartuppe*, 6 Wall. 258, 18 L.Ed. 829 (1967)). The bare averment of a federal question is not sufficient as there must be grounds for such an averment, otherwise a federal question might be set in almost any case. (*City of New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 12 S.Ct. 142, 35 L.Ed. 943 (1891)).

Petitioner, again, has set forth absolutely no actual injury incurred as a result of challenged official conduct where a valid federal right exists.

Therefore, as evidenced by petitioner's questions presented, petition merely sets forth an abstract or hypothetical question to the high court inviting an advisory opinion regarding the issue of prosecutorial immunity and legislative immunity to be afforded City officials in a case where no injury has been, or could be, properly alleged under the Constitution. Respondents respectfully submit that the court may not issue an advisory opinion and must only address those issues that are clearly focused and involve specific conflicts. (*U.S. v. Freuhauf*, 365 U.S. 146, 81 S.Ct. 547, 5 L.Ed.2d 476 (1961)). For these reasons, respondents urge that petitioner's writ be denied.

II. THE CALIFORNIA COURTS CORRECTLY FOUND THAT CITY ATTORNEY KATHE WAS ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY PURSUANT TO THE U.S. SUPREME COURT CASE OF *IMBLER V. PACHTMAN*.

Petitioner alleges in his first issue presented for review that the California Supreme Court wrongly

refused to hear Amburgey's Petition for Review and wrongfully sustained the Court of Appeals grant of absolute prosecutorial immunity to respondents. Petitioner claims the California courts ignored federal decisions and inappropriately extended the U.S. Supreme Court's decision in *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

However, petitioner fails to appreciate the true issue in this matter is whether Amburgey's complaint and first amended complaint alleged sufficient facts to constitute *any* violation of a federally protected right pursuant to 42 U.S.C. § 1983 or § 1988, and only secondarily, whether City officials protected by an absolute immunity for acts allegedly causing the deprivation of a federally protected right. Without deprivation of a federally protected right, privilege or immunity, the petitioner lacks standing before this Court, and the petition is therefore without merit.

Nevertheless, the California Court of Appeals did not err in their analysis of the issue of prosecutorial immunity. In *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), this court held that strong public policy mandated absolute immunity from civil liability for a prosecutor because public trust would suffer if the prosecutor were constrained in every decision hampered by his own potential liability. (*Id.*, pp. 424-425). In *Briggs v. Goodwin*, 569 F.2d 10 (D.C.Cir. 1977), the D.C. Circuit held that the crucial inquiry regarding the question of prosecutorial immunity centers on the nature of the official behavior challenged, not in the title of the officer responsible therefor. (*Id.*, p. 21). Read together, *Imbler* and *Briggs* establish that City Attorney Kathe was absolutely

immune for prosecutorial activities undertaken within his role.

In the instant matter, § 91001.5 of the *California Government Code* gave the respondent City Attorney Kathe the power to prosecute violations of the Political Reform Act. Section 42803.5 of the *California Government Code* gave him the authority to prosecute misdemeanor violations occurring in the City. Costa Mesa Municipal Code §§ 2-401 and 2-408 mirror the *California Government Code* regarding conflict of interest, and § 1-33 allows the City Attorney to prosecute criminal violations of the conflict of interest provisions. The California Court of Appeal, therefore, correctly held that the allegations of Amburgey's own complaint compelled the conclusion that City Attorney Kathe was acting as a prosecutor under these provisions when he undertook investigation of Amburgey's suspected violations of the Political Reform Act.

Disclosure of the inquiry into petitioner's actions to the concerned public via the press and to the district attorney for further felony investigation were part and parcel of the City Attorney Kathe's job as a prosecutor as authorized by the *California Government Code* and the Costa Mesa Municipal Code. Petitioner's complaint, while alleging that City Attorney Kathe undertook "investigative" acts, fails to allege any facts in support thereof and uses the term of art in hopes of confusing prosecutorial acts with extra-prosecutorial acts, where no confusion exists.

Further, the California Court of Appeal did not fail to appreciate the federal court decisions rendered in *Burns v. Reed*, 500 U.S. 478, 11 S.Ct 1934, 114 L.Ed.2d 547 (1991).

Contrary to petitioner's contention, this court in *Burns v. Reed,* did not hold that acts of a prosecutor in interrogating witnesses and obtaining evidence is "investigative" in nature. In *Burns v. Reed,* this court held there was no historical nor common-law support to extend absolute immunity to acts of a state prosecutor who advised police how to conduct the investigative phase of a criminal case. Petitioner comes to the erroneous conclusion that since police investigative acts are entitled to only qualified immunities, then acts of investigation by a prosecutor, acting as a prosecutor, are also entitled to qualified immunity. (Petition, p. 19). Petitioner cites no authority whatsoever for this unwarranted conclusion and ignores completely that the acts undertaken by City Attorney Kathe were completely within his role as prosecutor and were in no manner extra-prosecutorial.

Petitioner further likens the acts undertaken by City Attorney Kathe within his prosecutorial role to extra-prosecutorial acts undertaken by the prosecutor in the case of *Buckley v. Fitzsimmons,* ___ U.S. ___, 113 S.Ct. 2606, 125 L.Ed.2d 209. It is important to note the *Buckley* decision involved a critical finding that cannot be made herein: that a constitutional violation had occurred for which 42 U.S.C. § 1983 provided a remedy. In *Buckley,* Buckley commenced his action after being wrongly incarcerated for three years with a clear loss of liberty. His incarceration was found to be a result of fabricated false evidence and false statements made by a prosecutor for the purpose of securing the prosecutor's reelection. The statements of the prosecutors were made exclusively for personal gain in securing their reelection. However, none of the same facts are at issue herein. Amburgey was not

deprived of a federally recognized right, nor did the City Attorney Kathe fabricate false evidence nor make false statements for personal gain. The two factual situations are entirely dissimilar and the legal issues inapposite.

III. THE CALIFORNIA COURTS CORRECTLY FOUND THAT PETITIONER DID NOT PRESENT ANY RECOGNIZED CIVIL RIGHTS VIOLATION.

Petitioner next alleges that the California courts erred by finding that statements made by the City Attorney Kathe were entitled to absolute prosecutorial immunity. Petitioner alleges that he suffered violation of his "civil rights" which he defines as "failure to compete equally in the election, monetary loss to his business and loss of compensation as a council member" as a result of statements made by the City Attorney. (Petition, p. 23). Once again, however, petitioner fails to appreciate none of the alleged losses are federally recognized civil rights.

Petitioner erroneously contends that he has alleged a government interest in being employed as an elected City council member for the City of Costa Mesa. (Petition, p. 23-24). However, this is simply not the case, as evidenced by petitioner's failure to cite authority in support thereof.

In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 773 (1976), this court made it clear that a party may not indirectly bring a defamation action under 42 U.S.C. § 1983 merely because the defendant is a governmental official, unless he can demonstrate stigmatization and the depravation of a state law right or status. (*Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 47 L.Ed.2d (1976)).

Petitioner attempts to contrive a tenuous link between a stigma he claims he suffered as a result of the investigation of his suspect business dealings and loss of an elected position. However, petitioner ignores completely that cases dealing with termination of employment involve a conscious decision by a governmental official to deprive an employee of that employment. (e.g. *Neu v. Corcoran,* 869 F.2d 662 (2nd Cir. 1989) and *Lubley v City and County of San Francisco,* 98 Cal.App. 3d 340 (1979)).

In the instant case, petitioner did not have a vested interest in his council seat, nor was he terminated by an act of a governmental official. His employment was in no manner curtailed by respondents. Petitioner was simply voted out of office by the voters of the City of Costa Mesa as was their prerogative.

Petitioner further contends that the California courts strayed from the functional approach enunciated in *Butz v. Economu,* 438 U.S. 478, 511-12, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) and *Forrester v. White,* 484 U.S. 219, 277, 708 S.Ct. 538, 98 L.Ed.2d 555 (1988) by granting City Attorney Kathe absolute prosecutorial immunity. (Petition p. 25).

The functional approach, as described in *Forrester v. White, supra,* involves examination of the nature of the function entrusted to an official in an effort to evaluate the effect exposure to liability would have on the efficient exercise of the official's duties. (*Forrester v. White,* 484 U.S. 219, 277, 708, S.Ct. 538, 98 L.Ed.2d 555). Unlike the case here, *Forrester* involved a state court judge, not a prosecutor, and questioned whether a judge had absolute immunity from suit for his decision to demote and discharge a court employee. Under the circumstances, it was held

that the judge was entitled to only qualified immunity for his acts as they were not intimately associated with his function as a judge. Furthermore, unlike the case herein, an actual property interest had been infringed by governmental action.

In *Butz v. Economu,* 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), this court specifically reaffirmed the holding in *Imbler v. Pachtman, supra,* wherein it was held that the prosecutor's functional role in the criminal justice system necessarily required absolute immunity as qualified immunity might have an adverse effect on the function of the criminal justice system by discouraging the initiation of prosecutions and affecting the prosecutor's effective conduct. (*Butz v. Economu,* 438 U.S. 478, 510).

Therefore, it is clear the California courts did not fail to appreciate and apply the "functional" approach, and in fact closely and appropriately applied it in the instant case.

IV. THE CALIFORNIA COURTS CORRECTLY FOUND THE CITY MAYOR AND CITY MANAGER WERE ENTITLED TO ABSOLUTE LEGISLATIVE IMMUNITY

Petitioner contends that the California courts' grant of absolute legislative immunity to City council members and the City Manager was an unwarranted extension of *Briscoe v. Lahue,* 46 U.S. 325 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), and conflicts with a second circuit decision in *White v. Frank,* 855 F.2d 956 (2nd Cir. 1988) warranting U.S. Supreme Court review.

Once again, absent a federally protected right, privilege or immunity granted petitioner, the issue of legislative immunity is academic only. Nevertheless, the California courts did not err in holding a legislator acting in a sphere of legitimate legislative activity is absolutely immune from civil liability for his or her acts. (*Tenney v. Bradhove*, 341 U.S. 367, 379, 71 S.Ct 783, 95 L.Ed. 1019 (1952)).

In *Tenney v. Bradhove, supra*, members of the California Legislature were charged with wrongful investigation and requesting a local prosecutorial official to bring a criminal action against Tenney. Tenney alleged the acts of the member of the legislature were done to intimidate and silence him in an effort to deter and prevent him from exercising his constitutional rights. (*Id.*, p. 371). However, this court held that the legislators were entitled to absolute legislative immunity as the investigations were a necessary and well recognized part of representative government. (*Id.*, p. 377). This holding has specifically been extended to regional and municipal officials. (*Lake County Estates Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979); *Atchison v. Raffiani*, 709 F.2d 96 (3rd Cir. 1983)). Based on the allegations in petitioner's own complaint, Mayor Hornbuckle and City Manager Roeder were entitled to absolute legislative immunity. Additionally, the *California Government Code* § 815.2 (b) specifically exempts the City from an act or omission or a City employee. the City, therefore, is immune from liability to petitioner as well.

Petitioner states that the California courts incorrectly extended this court's decision in *Briscoe v. Lahue*, 46 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983) but petitioner

fails to discuss his contention in the body of the writ. *Briscoe* presented a question of statutory construction of 42 U.S.C. § 1983 questioning whether a convicted person could assert a claim for damages against a police officer for giving perjured testimony at the convict's criminal trial. This court held that witnesses are absolutely immune from liability based on their testimony, even where a governmental official (in the *Briscoe* case, a police officer) testified regarding performance of his official duties. (*Id.*, p. 326). The *Briscoe* case, therefore, appears to present an entirely disparate issue, completely unrelated to the case at bar and bears no relevance to petitioner's contention in his question presented, i.e., that the California courts improperly extended the holding in *Briscoe*. Respondents submit this is an entirely meritless contention improperly presented and improperly briefed herein.

Petitioner further contends that the California courts' decision conflicted with a second circuit decision in *White v. Frank,* warranting U.S. Supreme Court review; however, once again, petitioner fails to set forth any argument regarding the *White v. Frank,* decision and even fails to set forth a citation for that case. Respondents, therefore, merely point out that petitioner has failed entirely to brief yet another basis upon which he requests his petition for a writ be granted.

V. THE ISSUE OF AN ATTORNEY-CLIENT RELATIONSHIP BETWEEN PETITIONER AND THE COSTA MESA CITY ATTORNEY PRESENTS A NON-FEDERAL ISSUE ADEQUATELY DECIDED ON INDEPENDENT STATE GROUNDS.

Lastly, petitioner contends that the issue of whether or not respondent City Attorney Kathe and petitioner had

an attorney-client relationship is worthy of U.S. Supreme Court review. It must be assumed, though not set forth in Amburgey's petition, that petitioner is contending that he was injured as a result of an action by the City Attorney. Once again, petitioner sets forth no federal right, privilege or immunity he was deprived as a result of the alleged wrongful actions of City Attorney Kathe. Without such an allegation, petitioner again lacks standing before this court. Further, petitioner appears to set forth a purely state law issue, i.e., whether under California law City Attorney Kathe and petitioner had an attorney-client relationship. This issue was completely decided by the California Court of Appeal.

The California Court of Appeal clearly concluded that according to the case of *Ward v. Superior Court*, 70 Cal.App. 3d 23 (1977), the City Attorney had only one client: the City of Costa Mesa. (*Id*, p. 32). Additionally, *California Government Code* § 41805 clearly sets forth that the City Attorney charged with prosecutorial discretion shall not represent any person accused of violating an ordinance of the City that employs the attorney. (*People v. Pendleton*, 25 Cal. 3d 371, 379 (1979); *People v. Rhodes*, 12 Cal. 3d 1880, 1887 (1974)). Therefore, as a matter of California law, respondent City Attorney Kathe was absolutely precluded from performing or entering into an attorney-client relationship with Amburgey.

Further, according to *California Government Code* § 41801, the City Attorney may *only* advise the City officials in matters pertaining to City business. Again,

according to state and federal law, a City Attorney may not be exposed to civil liability for performing his duties.

CONCLUSION

The jurisdiction of the United States Supreme Court to review a judgment of a state court is limited to justiciable cases or controversies. Petitioner herein has not alleged deprivation of a right, immunity or privilege guaranteed under federal law and has not set forth a recognizable injury caused by governmental action. Therefore, respondents respectfully submit petitioner lacks standing before this court as to each issue presented for review. Instead petitioner requests an impermissible advisory opinion regarding the federal doctrine of prosecutorial immunity and legislative immunity and inappropriately requests the court issue an opinion regarding non-federal issues completely decided on adequate state law grounds.

For all of the above reasons, respondents respectfully request Orville Amburgey's Petition for Writ of Certiorari be denied.

Respectfully submitted,

LAW OFFICES OF EDWIN J. RICHARDS
& ASSOCIATES
1055 North Main Street
Suite 922
Santa Ana, CA 92701
714-558-7447

APPENDIX A

FILED NOVEMBER 18, 1993

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

ORVILLE AMBURGEY, Plaintiff and Appellant, v. CITY OF COSTA MESA, et al., Defendants and Respondents.	GO13222 (Super. Ct. No. 669203) OPINION

APPEAL from a judgment of the Superior Court of Orange County, Randall K. Wilkinson, Judge. Affirmed.

Burns & Oblachinski and Michael F. Burns for Plaintiff and Appellant.

Michael M. McMahon and Edwin J. Richards for Defendants and Respondents.

* * *

Plaintiff Orville Amburgey, former Costs Mesa councilman, was investigated for conflict of interest by the city attorney, who then referred the matter to the Orange County District Attorney. When the district attorney dismissed the charges, Amburgey filed a complaint for damages against the city, its mayor, Mary Hornbuckle, its city manager, Allan Roeder, and its city attorney, Thomas

Kathe (collectively respondents). Respondents' demurrer to the first amended complaint was sustained without leave to amend and Amburgey appeals, contending: (1) he had a federally protected right to bring his action; (2) Kathe was entitled only to qualified immunity because he acted as an investigator; (3) Hornbuckle and Roeder were only entitled to qualified immunity because they were not acting in a legislative capacity; and (4) Amburgey and Kathe had an attorney/client relationship which Kathe breached.[1]

FACTS

Amburgey was a Costa Mesa city council member. He also owned Amburgey Electric, a business which performed subcontract work for a company which provided cable television to the city under a franchise agreement. City Attorney Kathe concluded Amburgey may have violated state conflict of interest laws by voting on a franchise agreement with that company.[2] He informed City

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[1] The order sustaining the demurrer without leave to amend is not appealable. (Code Civ. Proc., § 904.1.) However, a judgment of dismissal was entered by the court on July 26, 1993. Therefore, because the parties have briefed the issues, in the interests of justice and to prevent unnecessary delay, we deem the order sustaining the demurrer to incorporate the judgment and treat the notice of appeal as being taken therefrom. (See *Munoz v. Florentine Gardens* (1991) 235 Cal.App.3d 1730, 1731-132.)

[2] Kathe believed Amburgey violated Government Code sections 87100, 87103 and 91000 of the Political Reform Act of 1974. (All statutory references are to the Government Code unless otherwise specified.)

Manager Roeder of his conclusions and referred his findings to the district attorney. It was Kathe's belief Amburgey may have committed felonies and Kathe was only empowered to prosecute misdemeanors. Thereafter, the district attorney's office conducted its own investigation and, after filing a misdemeanor charge against Amburgey, subsequently dismissed all criminal charges.

Amburgey then filed his complaint for damages against respondents, alleging causes of action for deprivation of rights under color of state law (42 U.S.C., §§ 1983, 1988), legal malpractice, breach of fiduciary duty, conspiracy, slander per se, libel per se, intentional infliction of emotional distress, and negligent infliction of emotional distress. The gravamen of the complaint was that respondents injured him by reporting the apparent criminal violations to the district attorney and the press. After respondents' demurrer was sustained with leave to amend, Amburgey filed a first amended complaint, and, at this time, respondents' demurrer was sustained without leave to amend.

Section 87100 provides in part: "no public official . . . shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

Section 87103 states in part: "An official has a financial interest in a decision . . . if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family . . . "

Under section 91000, a violation of the Political Reform Act is prosecuted as a misdemeanor.

The trial court ruled Amburgey's civil rights cause of action failed to allege any violation of a federally protected right, that City Attorney Kathe was entitled to absolute immunity because he was acting in his prosecutorial capacity, and that Mayor Hornbuckle and City Manager Roeder were entitled to absolute legislative immunity. As for the legal malpractice and breach of fiduciary duty causes of action against Kathe, the court ruled the complaint failed to state a cause of action based on an attorney/city relationship.

The court then granted Amburgey's motion for reconsideration and affirmed its prior ruling. This appeal followed.

STANDARD OF REVIEW

In ruling on an order sustaining a demurrer without leave to amend, this court must determine whether the complaint states a cause of action even though "the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged." (*Matteson v. Wagoner* (1905) 147 Cal. 739, 742; see also *Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1043.) The question is whether the complaint states a cause of action under any legal theory. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.) Moreover, any material fact alleged in the complaint must be assumed true, except for contentions, deductions, or conclusions of fact or law, and allegations contradicted by judicially noticed facts. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572.)

DISCUSSION

A. The Cause of Action for Civil Rights Violations

Amburgey attempted to allege a cause of action for deprivation of rights under color of state law. (42 U.S.C. §§ 1983, 1988.)[3] To state such a cause of action, plaintiff must allege the deprivation of a right, immunity, or privilege guaranteed under federal law. (*Parratt v. Taylor*

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[3] 42 U.S.C. section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. section 1988 states in part: "(a) The jurisdiction . . . conferred on the district courts by the provisions of this title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons of the United States in the civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and governed the said courts in the trial and extended to and governed the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

(1981) 451 U.S. 527, 535.) Amburgey's first amended compliant alleged respondents deprived him of his rights, privileges and immunities under the United States Constitution in that their actions "amounted to an arbitrary invasion . . . the security of [Amburgey's] privacy, person and business and were not authorized by law." It further alleged he had a property right in employment as a city council member, that he had the right to be free from stigma, and that he was damaged as a result of stigma caused by respondents and loss of employment as a council member.

As for his contention that respondents deprived him of a property right in the form of employment. Amburgey is correct that government employment *may*, under certain circumstances, be a protected property interest. However, the mere subjective expectancy of employment does not give rise to a property interest for the purpose of bringing the due process clause into play in an action under 42 U.S.C. section 1983. (See *Jones v. Hopper* (10th Cir. 1969) 410 F.2d 1329.) A discharged employee must have an "entitlement" to employment before he or she is entitled to a protected property interest. Here, Amburgey had no entitlement to continued employment as a council member. At most, he had a subjective expectancy of continued employment, but no property interest in continuing as a council member.

In addition, the United States Supreme Court has made it clear that an allegation of defamation by a government official does not give rise to a cause of action for civil rights violations. (*Paul v. Davis* (1976) 424 U.S. 693, 712). In *Paul* the plaintiff claimed government officials violated his rights by including his name on a list of

shoplifters which was circulated to businesses, and argued the stigmatization impaired his future employment opportunities. However, the Supreme Court affirmed the dismissal of his action, noting that the mere fact that a state official is the alleged tortfeasor does not give rise to a federal civil rights cause of action and that damage to reputation alone does not rise to the level of a constitutional violation. (*Id.* at pp. 700-701.) The Supreme Court reemphasized a long line of case law holding that damage to reputation, without more, does not rise to the level of a constitutional violation. (*Id.* at pp. 702-711.) Accordingly, Amburgey was required to allege that respondents damaged his reputation *and* altered or extinguished a state law right or status. He failed to do so.

Amburgey argues the Supreme Court held in *Paul v. Davis, supra,* 424 U.S. 693 that "there is a liberty interest protected by the Fourteenth Amendment when you are dealing with termination of employment benefits . . . " However, *Paul* makes it clear that a plaintiff may not indirectly bring a defamation action under 42 U.S.C. section 1983 merely because the defendant is a government official, unless he or she can show stigmatization *and* the deprivation of a state law right or status.

The "state right" alleged by Amburgey is his "right to run for office and be gainfully employed as a city councilman . . . " However, Amburgey failed to allege facts sufficient to show that respondent altered or extinguished *any* right. His employment as a council member was altered or extinguished by the voters of Costa Mesa, not respondents.

Amburgey's reliance upon *Wisconsin v. Constantineau* (1971) 400 U.S. 433 is misplaced. He argues that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (*Id.* at p. 437.) However, the Supreme Court in *Paul* rejected Amburgey's interpretation of the language in *Wisconsin v. Constantineau*, stating that the language "could be taken to mean that if a government official defames a person, without more, the procedural requirements of the Due Process Clause of the Fourteenth Amendment are brought into play. If read that way, it would represent a significant broadening of the holdings of [prior Supreme Court cases]." (*Paul v. Davis, supra,* 424 U.S. at p. 708.) Here, as in *Paul,* no governmental action deprived Amburgey of a right he previously held under state law.

Amburgey seeks to rely upon *Rodriquez De Quinonez v. Perez* (1st Cir. 1979) 596 F.2d 486 for the proposition that he "had a state right to run for office and to be gainfully employed as a city councilman. [He] had a right to be considered equal with other individuals who were also running for that position. The government action in this case deprived him of that right by placing him in an extreme disadvantage to the other candidates . . . " However, *Rodriquez De Quinonez* is inapposite. There, the plaintiffs were former directors of the Bank of Puerto Rico. The trial court found their removal by the Secretary of Treasury amounted to a violation of a liberty interest because their removal stigmatized them and denied them a right previously held under state law. (*Id.* at p. 489.) Here, unlike the plaintiffs in *Rodriquez De Quinonez,* Amburgey has not been able to identify any state right

which could have been arguably extinguished by respondents. He claims a state law right to run for and hold office but there is no authority for the source of such a right. Moreover, the plaintiffs in *Rodriquez De Quinonez* were removed from their positions by a government official. (*Id.* at p. 488.) Here, Amburgey cannot allege that respondents terminated or removed him from his position. He was removed by the voters.

Amburgey also seeks to rely upon *Haight v. City of San Diego* (1991) 228 Cal.App.3d 413 and *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340 for the proposition that where there is deprivation of a "liberty" guaranteed under the due process clause, a nontenured employee who is stigmatized as a result of termination is entitled to due process. Again, the argument ignores the fact that in those cases, the plaintiffs were terminated by government employees. (*Haight v. City of San Diego*, supra, at p. 415; *Lubey v. City and County of San Francisco, supra*, 98 Cal.App.3d at p. 344.) Any actionable stigma to a plaintiff's reputation must result from his or her termination or dismissal from employment.

Amburgey argues termination is not required, relying on *Perry v. Sindermann* (1972) 408 U.S. 593. In *Perry*, the plaintiff brought suit when his employment was not renewed. As with cases involving termination, however, *Perry* involved a conscious decision by government officials to end the plaintiff's employment, thus triggering the due process requirements. (See e.g., *Neu v. Corcoran* (2nd Cir. 1989) 869 F.2d 662; *Lubey v. City and County of San Francisco, supra*, 98 Cal.App.3d at p. 344.)

Here, Amburgey merely alleges he was defamed by respondents. He attempts to turn a potential state law cause of action into a federal civil rights action by alleging a tenuous link between the "stigma" he suffered and his loss of employment. However, he was not terminated, and his employment was in no way curtailed by respondents. He was voted out of office by the voters of the City of Costa Mesa. For these reasons, Amburgey failed to state facts sufficient to show that any federal right was infringed upon, and the trial court properly ruled that he failed to state a cause of action under 42 U.S.C. section 1983.

B. Was Kathe Entitled to absolute Prosecutorial Immunity?

Amburgey next contends City Attorney Kathe was not entitled to absolute prosecutorial immunity because he acted as an investigator. The substance of his allegations is that he was injured because Kathe brought charges against him, then turned the matter over to the district attorney and notified the press. Under a long line of Supreme Court cases, Kathe's actions must be considered prosecutorial and he is entitled to absolute immunity.

In *Imbler v. Pachtman* (1976) 424 U.S. 409, the United States Supreme Court emphasized the strong public policy considerations mandating absolute immunity from civil liability for a prosecutor under such circumstances. The court observed that the mere grant of qualified immunity to a prosecutor would undermine his or her performance and that "public trust of the prosecutor's

office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." (*Id.* at pp. 424-425.)

In *Briggs v. Goodwin* (D.C. Cir. 1977) 569 F.2d 10, the Court of Appeals observed that the "crucial inquiry [on the question of immunity] concerns the nature of the official behavior challenged, not the identity or title of the officer responsible therefor." (*Id.* at p. 21.) The court defined prosecutorial activities as the exercise of "judicial or quasi-judicial discretion." (*Ibid.*; see also *McCray v. Maryland* (4th Cir. 1972) 456 F.2d 1, 3-4.)

Read together, *Imbler* and *Briggs* establish that a prosecutor is absolutely immune for prosecutorial activities. Here, Kathe's actions justified the grant of absolute immunity.

Section 91001.5 gives a city attorney the power to prosecute violations of the Political Reform Act. Section 42803.5 authorizes a city attorney to prosecute misdemeanor violations occurring in his or her city. Costa Mesa Municipal Code sections 2-401 and 2-408 parallel the Government Code on conflict of interest, and section 1-33 empowers the city attorney to prosecute criminal violations of those conflict of interest provisions. Here, the allegations of Amburgey's complaint compel the conclusion that Kathe was acting as a prosecutor under these provisions.

Although Amburgey claims Kathe's investigative activities damaged him, the complaint alleges only that Kathe and others disclosed the results of their investigation to the press and turned over their results to the

district attorney. These actions were part and parcel of the decision by the city attorney to initiate a prosecution as authorized by the Government Code and the Costa Mesa Municipal Code. A prosecutor is absolutely immune from liability under section 1983 for his or her conduct in initiating a prosecution so long as that conduct is "intimately associated with the judicial phase of the criminal process." (*Imbler v. Pachtman, supra,* 424 U.S. at 430-431; see also *Burns v. Reed* (1991) 500 U.S. ___, ___ 114 L.ed.2d 547, 558.) Here, Amburgey alleges Kathe engaged in investigative acts. It is true that the Supreme Court in *Imbler* did not decide whether absolute immunity should extend to "those aspects of the prosecutor's responsibility that cast him in the role of an . . . investigative officer rather than that of an advocate." (*Imbler v. Pachtman, supra,* at pp. 430-431.) However, the court noted that "the duties of the prosecutor in his role as advocate . . . involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." (*Id.* at p. 431, fn. 33.) Here, fairly read, Amburgey's complaint seeks to predicate an action for damages upon the contention that Kathe, "acting within the course and scope of [his] employment," brought criminal charges against Amburgey for conflict of interest, then referred the matter to the district attorney who filed, then dismissed, criminal charges. Kathe was authorized by Government Code sections 91001.5 and 41803.5 to prosecute violations of the Political Reform Act and to prosecute misdemeanor violations occurring in the city. He was similarly empowered by Costa Mesa Municipal Code sections 2-401, 2-408 and 1-33 to enforce conflict of interest laws. Although the complaint states Kathe's actions were

investigative, the alleged facts reveal his acts were part of the decision of whether to initiate a prosecution against Amburgey, and as such within his duties as a prosecutor. (*Imber v. Pachtman, supra,* 424 U.S. at p. 431, fn. 33; *Burns v. Reed, supra,* 500 U.S. at p. ___. Kathe is entitled to absolute immunity for the allegations in Amburgey's complaint.[4]

C. Were Hornbuckle and Roeder Entitled to Absolute Legislative Immunity?

Amburgey next argues that Mayor Hornbuckle and City Manager Roeder are not entitled to absolute immunity. Again, we disagree.

As the United States Supreme Court has made clear, a legislator who acts in a sphere of legitimate legislative activity is absolutely immune from civil liability for his or her acts. (See *Tenney v. Brandhove* (1952) 341 U.S. 367, 379.) in *Tenney,* the plaintiff charged members of the California Legislature with investigating, then requesting local prosecutorial officials to instigate a criminal action against him. He alleged these acts were not done with a legislative purpose but to "intimidate and silence [him] and deter and prevent him from effectively exercising his constitutional rights . . . " (*Id.* at p. 371.) The Supreme

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[4] The complaint, while alleging "investigative activities" fails to state facts sufficient to overcome the absolute immunity. Rather, it is a thinly veiled attempt to disguise a cause of action for malicious prosecution, for which a prosecutor is absolutely immune. (*Burns v. Reed, supra,* 500 U.S. at p. ___, citing *Vaselli v. Goff* (1926) 265 U.S. 503.)

Court held the legislators were entitled to absolute immunity, stating that investigations are a necessary and well recognized aspect of representative government. (*id.* at p. 377.) The only question, according to the court, is whether the legislator has acted in an area where legislators traditionally have the power to act. (*Id.* at p. 379.) Tenney's proclamation as to absolute legislative immunity to state legislators has subsequently been applied to regional and municipal officials. (See, e.g., *Lake County Estates, Inc. v. Tahoe Reg'l. Planning Agency* (1979) 440 U.S. 391; *Healy v. Town of Pembroke Park* (11th Cir. 1987) 831 F.2d 989; *Atchison v. Raffiani* (3rd Cir. 1983) 709 F.2d 96.)

Public policy supports the grant of absolute immunity to legislators acting in an area where they are traditionally empowered to act. Based on the allegations of the complaint, Hornbuckle and Roeder are entitled to absolute immunity.

Moreover, "except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." (Govt. Code, § 815.2, subd. (b).) Because respondents Kathe, Hornbuckle and Roeder had absolute immunity for their alleged acts committed within the course and scope of their duties, respondent City of Costa Mesa cannot be held liable to Amburgey either.

D. Did Kathe and Amburgey Have an Attorney/Client Relationship?

Finally, in his first amended complaint and proposed second amended complaint, Amburgey alleges cause of

action against City Attorney Kathe for legal malpractice and breach of fiduciary duty, claiming Kathe for legal malpractice and breach of fiduciary duty, claiming Kathe and he had an attorney/client relationship, which Kathe breached. He ignores the fact that Kathe's client was the City of Costa Mesa and it was the city to which he owed a duty.

In *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, the Court of Appeal concluded that a county counsel's representation of county offices in civil actions did not alter the fact that county counsel has only one client, the county. (*Id.* at p. 32; see also *Meehan v. Hopps* (1956) 144 Cal.App.2d 284, 290 ["attorney for a corporation represents it, its stockholders and its officers in their representative capacity. He in nowise represents the officers personally."].)

In addition, Government Code section 41805 provides that the city attorney charged with prosecutorial discretion shall not represent any person accused of violating an ordinance of the city that employs the attorney. (See also *People v. Pendleton* (1979) 25 Cal.3d 371, 379; *People v. Rhodes* (1974) 12 Cal.3d 1880, 187.) Thus, respondent Kathe was precluded from performing or entering into any attorney/client relationship with Amburgey concerning the alleged conflict of interest charges.

Amburgey alleges legal malpractice under Government Code section 41801, which provides that "[t]he city attorney shall advise the city officials in all matters pertaining to city business." However, this has no effect on the issue of any relationship between the city attorney and a city council member. Again, section 41801 provides

that the city attorney's advice is restricted to "legal matters pertaining to city business." Nothing in section 41801 requires a city attorney to give advice to a city official facing criminal charges.

Here, the allegations of the first amended complaint reveal only that respondent Kathe fulfilled his duty to the city and did not give protection or advice to Amburgey. A city attorney may not be exposed to civil liability for performing his or her duties. Accordingly, Amburgey's complaint fails to state a cause of action for legal malpractice or breach of fiduciary duty.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

MOORE, ACTING P.J.

WE CONCUR:

WALLIN, J.

CROSBY, J.

APPENDIX B

4th Civil No.
G013222

IN THE
Court of Appeal
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

ORVILLE AMBURGEY,
Plaintiff and Appellant,

vs.

CITY OF COSTA MESA, et al.,
Defendants and Respondents.

APPEAL FROM
SUPERIOR COURT OF ORANGE COUNTY
HONORABLE RANDALL L. WILKINSON, JUDGE
O.C.S.C. No. 66-92-03

RESPONDENTS' BRIEF

MICHAEL M. McMAHON
EDWIN J. RICHARDS

Law Offices of
EDWIN J. RICHARDS & ASSOCIATES

1055 North Main Street
Suite 922
Santa Ana, California 92701
(714) 558-7447

Attorneys for Defendants and Respondents
CITY OF COSTA MESA, THOMAS A. KATHE,
MARY HORNBUCKLE and ALLAN ROEDER

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No. G013222

COURT OF APPEAL – FOURTH DISTRICT

DIVISION THREE

STATE OF CALIFORNIA

ORVILLE AMBURGEY,

Appellant,

vs. No. 66-92-03

CITY OF COSTA MESA, et al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT
OF ORANGE COUNTY
HONORABLE RANDALL L. WILKINSON, JUDGE

RESPONDENTS' BRIEF

I. STATEMENT OF THE CASE

a. Factual History

In 1990, after an investigation of existing City of Costa Mesa contracts, Costa Mesa City Attorney Thomas

Kathe (City Attorney Kathe) discovered what appeared to be violations of Government Code sections 87100, 87103, and 91000 by plaintiff and appellant Orville Amburgey. City Attorney Kathe's investigation revealed that then city council member Amburgey may have voted in favor of amending a contract with an independent subcontractor for cablevision rights in Costa Mesa. Council member Amburgey had a business relationship with the subcontractor before and after the vote on the contract.

After concluding the investigation, City Attorney Kathe advised city council members of the apparent conflict of interest, as required by the Costa Mesa Municipal Code (CMMC). Because he believed Amburgey may have committed felonies and because he was empowered to prosecute only misdemeanors, City Attorney Kathe referred the case to the Orange County District Attorney for felony prosecution. The district attorney investigated the case further and charged Amburgey with violations of Government Code sections 87100 and 87103. After discovering information not available to City Attorney Kathe at the time the case was referred, the district attorney dismissed the criminal charges against Amburgey.

b. Procedural History

This case commenced when plaintiff filed a complaint containing causes of action for: 1) civil rights violation; 2) legal malpractice; 3) breach of fiduciary duty; 4) conspiracy; 5) slander per se; 6) libel per se; 7) intentional infliction of emotional distress; and 8) negligent infliction of emotional distress (record p. 2). Named as defendants were the City of Costa Mesa (Costa Mesa), Mayor Mary

Hornbuckle, City Manager Allan Roeder, and City Attorney Thomas Kathe. All of plaintiff's causes of action revolved around his contention that defendants injured him by reporting his apparent criminal violations to the Orange County District Attorney and the press (record pp. 2-27). Defendants demurred to the complaint. Judge Randall Wilkinson of the Orange County Superior Court sustained the demurrers with leave to amend (record pp. 62, 63). Plaintiff then filed an amended complaint, alleging the same causes of action (record p. 67).

With some minor variations, plaintiff's amended complaint was the same as the original complaint. Defendants again demurred, and the court again sustained the demurrers, this time without leave to amend (record pp. 219, 221). The court found that plaintiff's civil rights cause of action failed to allege violation of a federally protected right (record pp. 259, 269). The court also found that City Attorney Kathe was entitled to absolute immunity from the civil rights cause of action because he was acting in a prosecutorial capacity (record p. 259). Similarly, the court found that defendants Hornbuckle and Roeder were entitled to absolute legislative immunity (record pp. 269-70). The court also ruled that the causes of action against City Attorney Kathe for legal malpractice and breach of fiduciary duty failed to state a cause of action because plaintiff and City Attorney Kathe did not have an attorney-client relationship (record p. 260). The court made additional rulings that are unrelated to the causes of action appealed here.

Plaintiff then filed a motion for reconsideration and submitted a proposed second amended complaint containing causes of action for 1) civil rights violation; 2)

legal malpractice; and 3) breach of fiduciary duty (record p. 222). The court reviewed the proposed second amended complaint and reconsidered its ruling. The court allowed the original ruling to stand, finding that plaintiff failed to state a cause of action (record p. 282).

Plaintiff now appeals from the order of the Orange County Superior Court granting the demurrers without leave to amend. Apparently, this appeal is only as to the causes of action for civil rights violation, legal malpractice, and breach of fiduciary duty.

II. ISSUES PRESENTED

1) Does plaintiff allege facts sufficient to state a cause of action for a 42 U.S.C. civil rights violation?

2) Is City Attorney Kathe entitled to absolute prosecutorial immunity for reporting plaintiff's alleged criminal acts to the district attorney?

3) Are defendants Hornbuckle and Roeder entitled to absolute legislative immunity for reporting plaintiff's alleged criminal acts?

4) Did City Attorney Kathe and plaintiff have an attorney-client relationship for purposes of his causes of action for legal malpractice and breach of fiduciary duty?

III. STANDARD OF REVIEW

"On appeal, 'a judgment . . . of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' "

" 'Where the evidence is in conflict, the appellate court will not disturb the verdict of the jury or the findings of the trial court.' " *Interiors v. Petrak* (1987) 188 Cal.App.3d 1363 (quoting 9 Witkin, *California Procedure,* Appeal § 268 (3d ed. 1985). Plaintiff fails to show such error and, in fact, fails even to address the applicable standard of review on appeal. When all evidence is considered in the light most favorable to prevailing defendants, the trial court's judgment should be affirmed.

IV. ARGUMENT

This case involves a disgruntled former city council member who was not reelected and a city attorney trying to enforce the provisions of the Political Reform Act. Plaintiff's first cause of action for civil rights violation fails because it does not identify a federally protected right that was violated. Even assuming for the sake of argument he can identify such a right, the cause of action fails because all defendants are immune from liability. City Attorney Kathe was acting in a prosecutorial capacity and is therefore entitled to absolute prosecutorial immunity. Defendants Hornbuckle and Roeder are entitled to absolute legislative immunity. Because all defendant city employees are immune, the City of Costa Mesa is also immune. Plaintiff's second and third causes of action for legal malpractice and breach of fiduciary duty also fail because City Attorney Kathe and plaintiff did not have an attorney-client relationship.

Strong public policies underlie the decisions granting absolute immunity for both prosecutorial and legislative activities. The trial court recognized the public policy

importance of such immunity and found that all defendants are immune. Public policy also supports the trial court's ruling that the City of Costa Mesa is City Attorney Kathe's client and that he and plaintiff did not have an attorney-client relationship. To hold otherwise would place city attorneys in the unenviable position of deciding whether to enforce the laws of the city and state or to remain silent where the allegedly criminal acts of a city official are involved.

a. An Order Granting a Demurrer Without Leave to Amend is a Nonappealable Order.

An appeal may be taken from only a final judgment terminating the proceedings below. "An order sustaining a demurrer without leave to amend is *not* an appealable order; only a judgment on such an order can be appealed." *I. J. Weinrot and Son v. Jackson* (1985) 40 Cal.3d 327, 331. As of the date of the filing of this brief, no judgment has been entered in the present action. The only order is the order sustaining the demurrers without leave to amend, which is not appealable.

b. Plaintiff Fails to Allege Violation of a Federally Protected Right.

To state a cause of action under 42 U.S.C. section 1983, a plaintiff must allege deprivation of a right, immunity, or privilege guaranteed under federal law. *Peterson v. Knutson,* 367 F. Supp. 515 (D. Minn. 1973). Plaintiff's proposed second amended complaint fails to do so, and the demurrer was properly sustained on this ground.

Defendants respectfully submit that the trial court's ruling on this issue should be affirmed by this court.

Plaintiff's alleged constitutional rights are never clearly stated, but the proposed second amended complaint states that defendants "infringed on plaintiff's liberty interests in that he was defamed and stigmatized as a criminal six days before the general election which resulted in the loss of a government benefit, that being employment as a city councilman . . . " (record p. 234). Decisions of federal and state courts reveal that plaintiff does not state facts sufficient to allege violation of a federally protected right.

Plaintiff's proposed second amended complaint appears to claim as the basis of his section 1983 cause of action three "federal rights:" 1) a property right in employment as a city council member; 2) freedom from stigma; and 3) a combination of stigma and loss of employment. The first two "rights" can be disposed of summarily, and a reading of plaintiff's proposed second amended complaint reveals that he has failed to state a cause of action under the third category.

Plaintiff's proposed second amended complaint alleges that defendants deprived him of a property right in the form of employment (record p. 230). In some cases, government employment may be a protected property interest. However, a mere subjective expectancy of employment does not give rise to a property interest for the purpose of bringing the due process clause into play in a section 1983 action. *Jones v. Hopper,* 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991. A discharged employee must have an "entitlement" to employment

before it becomes a protected property interest. Plaintiff in the present action had no entitlement to continued employment as a council member. At best he had a subjective expectancy of continued employment. Plaintiff had no property interest in employment as a council member.

The argument that defamation by government officials gives rise to a cause of action for civil rights violation was rejected by the United States Supreme Court in the seminal case *Paul v. Davis,* 424 U.S. 693 (1976). The plaintiff in *Paul* claimed that defendant government officials violated his federal rights by including his name on a list of active shoplifters that was circulated to businesses. Plaintiff claimed this action stigmatized him and impaired his future employment opportunities. In affirming the dismissal of the plaintiff's action, the Supreme Court held that: 1) the fact a state official is the tortfeasor does not give rise to a federal civil rights cause of action and 2) damage to reputation, by itself, does not rise to the level of constitutional violation.

The Supreme Court first summarily dismissed the argument that the due process clause should extend to plaintiff the right to be free of injury wherever the state is characterized as the tortfeasor. The Court concluded that "such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 700-01.

The *Paul* Court then cited a long line of cases in support of its holding that damage to reputation, without more, does not rise to the level of constitutional violation.

In these cases, reputation was protected only when a right or status previously recognized by state law was distinctly altered or extinguished. *Id.* at 702-11 *citing Wisconsin v. Constantineau,* 400 U.S. 433 (1971); *Weiman v. Updergraff,* 344 U.S. 183 (1952); *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123 (1951). Subsequent cases have referred to this as the "stigma-plus" test. *E.g., Dennis v. S&S Consolidated Rural High School Dist.,* 577 F.2d 338, 341 (5th Cir. 1978). In *Paul,* the Court found that the plaintiff did not demonstrate that any state law right or status was affected. *Paul,* 424 U.S. at 712.

Because *Paul* rejected the argument that damage to reputation alone does not give rise to a civil rights cause of action, plaintiff's complaint must succeed or fail on the "stigma-plus" test. That is, plaintiff must allege that defendants damaged his reputation and altered or extinguished a state law right or status.

Plaintiff makes vague allegations but fails to state a cause of action under *Paul* and cases following it. Plaintiff simply has not pleaded that defendants have altered or extinguished any state law right or status.

Plaintiff's brief on the subject of federally protected rights begins with an erroneous interpretation of *Paul v. Davis,* 424 U.S. 693 (1976). According to plaintiff, *Paul* held that "there is a liberty interest protected by the Fourteenth Amendment when you are dealing with termination of employment benefits" (plaintiff's brief p. 4). The real issue addressed in *Paul* is whether a plaintiff who alleges he was stigmatized by official state action can state a cause of action for civil rights violation under 42 U.S.C. section 1983. In *Paul,* the Supreme Court held

that such a stigma, without more, does not give rise to a section 1983 cause of action. *Id.*

The plaintiff's claim of federal rights violation is flawed under the holding of *Paul*. First, even assuming the plaintiff was stigmatized by defendants' alleged actions, the mere fact that defendants are government officials does not create a civil rights cause of action. In fact, plaintiff's civil rights cause of action appears to be no more than a camouflaged defamation action. Second, even assuming plaintiff can show he was stigmatized, the proposed second amended complaint fails to show the "plus" required to state a cause of action under section 1983.

The "state right" claimed by plaintiff appears to be the "right to run for office and be gainfully employed as a city councilman" (plaintiff's brief p. 7). If this is in fact the state law right or status plaintiff claims was altered, his argument fails for two reasons. First, plaintiff cites no authority to support the position that California recognizes this "right." Second, plaintiff fails to show that defendants altered or extinguished this right. Plaintiff's employment as a council member was altered or extinguished by the voters of Costa Mesa, not defendants.

Interestingly, in support of his position that he has a protected liberty interest, plaintiff cites *Wisconsin v. Constantineau*, 400 U.S. 507 (1971) (plaintiff's brief p. 6). However, this quote is taken completely out of context, as is demonstrated in *Paul*. In *Paul*, the Supreme Court cited the exact passage plaintiff cites and stated that this language "could be taken to mean that if a government official defames a person, without more, the procedural

requirements of the Due Process Clause of the Fourteenth Amendment are brought into play. If read that way, it would represent a significant broadening of the holdings of" prior Supreme Court cases. *Paul,* 424 U.S. at 708. The Court refused to read the passage so broadly. *Id.*

In support of his position that he alleges violation of a federally protected right, plaintiff cites *Rodriguez de Quinonez v. Perez,* 596 F.2d 486 (1st Cir. 1979). However, neither *Rodriguez de Quinonez* nor any of the cases cited in the passage plaintiff quotes are on point. In *Rodriquez de Quinonez,* the plaintiffs were former directors of the Bank of Puerto Rico. The court found that their removal by the Secretary of the Treasury of Puerto Rico amounted to violation of a liberty interest where the removal stigmatized plaintiffs and denied them a right previously held under state law. *Id.* at 489.

Two important points distinguish *Rodriquez de Quinonez* from the present action. First, plaintiffs in that case were specifically able to identify the source of the state right that was extinguished. *Id.* The plaintiff in the present action has claimed state law rights to run for and hold office but not identified the source of those "rights." Second, plaintiffs were removed from their positions by a government official. *Id.* at 488. Plaintiff in the present has not and cannot state that defendants terminated or removed him from his position. The cases cited in the passage that plaintiff cites from *Rodriquez de Quinonez* are also distinguished on this basis. *See, e.g., Dennis v. S&S Consolidated Rural High School Dist.,* 577 F.2d 338 (5th Cir. 1978) (local government officials refused to renew plaintiff's teaching contract); *Medina v. Rudman,* 545 F.2d 244

(1st Cir. 1976) (government officials refused to grant plaintiff a permit for Greyhound track).

Similarly, the California decisions cited by plaintiff do nothing to support his position. *See Haight v. City of San Diego* (1991) 228 Cal.App.3d 413; *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340. Although plaintiff is correct that both cases hold that due process is required when a non-tenured employee is stigmatized as a result of termination, plaintiff ignores the fact that both cases involved *termination by governmental employers. Haight,* 228 Cal.App.3d at 415; *Lubey,* 98 Cal.App.3d at 344. In fact, in *Haight,* plaintiff's case was dismissed because he voluntarily resigned before termination and had no property interest in his government employment.

Lubey stated that the exception to the rule of no due process requirement for termination of non-tenured employees "will be applied where the probationary employee's job termination, or dismissal, is based on charges which 'stigmatize' his reputation, or 'seriously impair' his opportunity to earn a living . . . , or which 'might seriously damage his standing and associations in the community." 98 Cal.App.3d at 346 (citations omitted). Significantly, this language from *Lubey* demonstrates that the stigma must be the result of *termination or dismissal* from employment. Defendants in the present action did not dismiss or terminate plaintiff's employment; the voters of Costa Mesa did.

To support his contention that a termination of employment is not required, plaintiff cites *Perry v. Sinderman,* 408 U.S. 593 (1972), which arose from the non-

renewal of employment. By contending that *Perry* stands for the proposition that termination or dismissal is not required, plaintiff attempts to play a game of semantics. Whether the plaintiff's employment ends directly through discharge or a non-renewal of employment is not the relevant point. A conscious decision by government officials to end employment is the common thread running through cases finding that due process is required with "stigma-plus" loss of employment. *See, e.g., Neu v. Corcoran*, 869 F.2d 662 (2d Cir. 1989); *Heger v. City of Costa Mesa* (1991) 231 Cal.App.3d 42, 47; *Lubey*, 98 Cal.App.3d 340, 344.

At most, plaintiff's proposed second amended complaint alleges that defendants defamed him. Plaintiff, however, has attempted to turn this state law cause of action into a federal civil rights action by alleging a tenuous link between the "stigma" he suffered and his loss of employment. The voters of the City of Costa Mesa voted plaintiff out of office. Even assuming for the sake of argument plaintiff can plead that he was elected out of office because of defendants' actions, he has failed to allege violation of a civil right. In short, defendants did not terminate plaintiff, refuse to renew his employment, remove him from his position, or in any way alter his status. Plaintiff has failed to allege a civil rights violation.

Because plaintiff has failed to state facts sufficient to show that any federal right was infringed, the trial court ruled that he failed to state a cause of action under section 1983. For this reason, the rulings on prosecutorial and legislative immunity were not necessary to the final judgment. Ordinarily, courts of appeal should not pass on

questions that are not necessary to their decision. *Coalition for Los Angeles County v. Board of Supervisors* (1977) 76 Cal.App.3d 241; *Hazelwood v. Hazelwood* (1976) 57 Cal.App.3d 693. Should this court uphold the trial court's ruling that plaintiff failed to allege violation of a federally protected right, the issues of prosecutorial and legislative immunity from liability for a civil rights cause of action need not be addressed.

c. City Attorney Kathe is Entitled to Absolute Prosecutorial Immunity Under Imbler v. Pachtman.

Plaintiff's proposed second amended complaint and opening brief make much of City Attorney Kathe's allegedly investigative activities. However, the real substance of plaintiff's claim for civil rights violation is that he was injured when the charges against him were turned over to the district attorney and the press. Because City Attorney Kathe's action in referring the case to the district attorney was prosecutorial, he is entitled to absolute immunity under *Imbler v. Pachtman,* 424 U.S. 409 (1976).

In granting prosecutors absolute immunity from civil liability in *Imbler,* the Supreme Court emphasized the public policy considerations underlying its decision. The Court reasoned that granting the prosecutor only a qualified immunity for prosecutorial actions would undermine the prosecutor's performance and that "the public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler,* 424 U.S. at 424-25. The *Imbler* Court, however, emphasized the boundaries of its holding and refused to

decide whether a prosecutor is entitled to absolute immunity for investigative activities. *Id.* at 430.

The issue left open in *Imbler* was decided by the United States Court of Appeal in *Briggs v. Stafford*, 569 F.2d 10 (D.C. Cir. 1977). *Briggs* granted only a qualified immunity to prosecutors acting in an investigative capacity. In granting this qualified immunity, the court stated that when a prosecutor acts in an investigative capacity, the public policy concerns cited in *Imbler* no longer control. *Id.* at 21. *Briggs* therefore concluded that in such situations prosecutors should be granted the same limited immunity as government investigators. *Id.*

In determining whether to grant absolute or limited immunity to a government official, *Briggs* stated that the "crucial inquiry concerns the nature of the official behavior challenged, not the identity or title of the officer responsible therefor." *Id.* The court gave further assistance in this distinction by defining prosecutorial activities as the exercise of "judicial or quasi judicial discretion." *Id., quoting McCray v. Maryland*, 456 F.2d 1, 3-4 (4th Cir. 1972). *Briggs* found the defendant prosecutor's act of concealing the identity of government witnesses from the court to be investigative because it was unrelated to advocacy issues such as whether to initiate or how to conduct a prosecution. 569 F.2d at 21.

Briggs did not, and in fact could not, overrule *Imbler's* grant of absolute immunity to prosecutors acting as advocates. *See Briggs*, 569 F.2d at 22. What remains after *Imbler* and *Briggs* is an absolute immunity for prosecutorial activities and a qualified immunity for investigative or administrative activities. The public policy concerns

expressed in *Imbler*, 424 U.S. at 424-25, continue to justify a grant of absolute immunity for civil actions related to prosecutorial discretion.

Several Government Code sections and provisions of the Costa Mesa Municipal Code (CMMC) authorize the city attorney to act as a prosecutor. Government Code section 91001.5 gives city attorneys the power to prosecute violations of the Political Reform Act. Government Code section 41803.5 authorizes city attorneys to prosecute misdemeanor violations occurring in their cities. CMMC sections 2-401 and 2-408 incorporate the Government Code's conflict of interest laws, and section 1-33 empowers the city attorney to prosecute criminal violations of the conflict of interest provisions. City Attorney Kathe was acting as a prosecutor under these provisions at the time of the actions giving rise to plaintiff's second amended complaint.

Plaintiff's proposed second amended complaint contains allegations about City Attorney Kathe's "investigative" activities. A close review of the second amended complaint reveals, however, that the crux of plaintiff's cause of action for civil rights violations remains his allegation that City Attorney Kathe and others disclosed the results of the investigation to the press and turned over the same results to the Orange County District Attorney for criminal prosecution. Such actions were not investigative, but part of the decision whether to initiate a prosecution against plaintiff. Had the district attorney not commenced a criminal prosecution, City Attorney Kathe had authority to commence a criminal prosecution.

Plaintiff fails to allege how any of City Attorney Kathe's "investigative" activities violated his civil rights. Plaintiff claims that he was deprived of employment and stigmatized as a criminal. These are the "civil rights" that plaintiff claims were violated. However, the plaintiff's proposed second amended complaint reveals that these "violations" could only result from City Attorney Kathe's referral of the plaintiff's case to the district attorney and the report of the referral to the media. Neither the media nor the district attorney was notified of the investigation while it was being conducted.

To overcome a demurrer, a complaint must allege ultimate facts, not merely evidentiary facts or conclusions of law. *Logan v. Southern California Rapid Transit Dist.* (1982) 136 Cal.App.3d 116. The trial court correctly ruled that plaintiff's original complaint, first amended complaint, and proposed second amended complaint, while alleging "investigative activities" failed to state facts sufficient to overcome immunity under *Imbler* Plaintiff's proposed second amended complaint and opening brief rely on conclusory statements that City Attorney Kathe's activities were investigatory and not prosecutorial. The trial court's ruling that City Attorney Kathe is entitled to absolute immunity was correct and should not be disturbed on appeal.

d. Defendants Hornbuckle and Roeder are Entitled to Absolute Legislative Immunity.

Plaintiff's proposed amended complaint relies on conclusory allegations regarding the actions of defendants Hornbuckle and Roeder to attempt to establish that

they are not absolutely immune from liability. A review of plaintiff's allegations, however, reveals that defendants Hornbuckle and Roeder are entitled to absolute immunity from plaintiff's cause of action for civil rights violation.

In 1951, the United States Supreme Court held that legislators who act in a sphere of legitimate legislative activity are absolutely immune from civil liability for their acts. *Tenney v. Bradhove,* 341 U.S. 367, 379 (1951). *Tenney* involved an action against members of the California Legislature. Plaintiff charged that these legislators investigated and asked local prosecutorial officials to initiate a criminal action against him. Plaintiff alleged that these acts were not done with a legislative purpose but to "intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights. . . . " *Id.* at 371.

In holding that the legislators were entitled to absolute immunity the Court stated that investigations are a well established component of representative government." *Id.* at 377. The Court reasoned that the courts are not the forum for determining whether legislators' motive in conducting such investigations are proper. The only relevant inquiry is whether the legislators were acting in an area where legislators traditionally have power to act." *Id.* at 379.

Although *Tenney* dealt with state legislators, subsequent cases have established that the absolute legislative immunity applies to regional and municipal officials. *See. e.g., Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency,* 440 U.S. 391 (1979); *Healy v. Town of Pembroke*

Park, 831 F.2d 989 (11th Cir. 1987); *Atchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983). *Lake Country* emphasized that *Tenney* recognized the need to provide immunity for the public good and found that "this reasoning is equally applicable to federal, state, and regional legislators." 440 U.S. at 405.

Plaintiff's brief confuses the immunities for prosecutors and legislators when it says that defendants Hornbuckle and Roeder were acting as investigators and are entitled to only qualified immunity. In fact, plaintiff cites in support of this proposition *Imbler v. Pachtman*, 424 U.S. 409 (1976) and *Briggs v. Stafford*, 569 F.2d 10 (D.C. Cir. 1977). However, both *Imbler* and *Briggs* addressed only prosecutorial immunity; neither mentioned legislative immunity.

Additionally, plaintiff's argument that defendants Hornbuckle and Roeder are not entitled to absolute immunity because they are alleged to have acted as investigators goes against the logic of the holding of *Tenney*. As previously mentioned, *Tenney* specifically dealt with allegations that a legislative investigation was conducted to violate plaintiff's civil rights. *Tenney* emphasized the importance of legislative investigations and refused to grant only qualified immunity where legislators investigate. 341 U.S. at 347.

Despite plaintiff's conclusory allegations, he has failed to show that defendants Hornbuckle and Roeder are not entitled to absolute immunity. The public policy considerations underlying *Tenney* and cases following it support a grant of absolute immunity to defendants

Hornbuckle and Roeder. Plaintiff has failed to demonstrate the trial court erred in finding that defendants Hornbuckle and Roeder are entitled to absolute legislative immunity. The ruling should therefore stand.

"Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Government Code § 815.2. Because defendants Kathe, Hornbuckle, and Roeder are immune from liability for all acts within the course and scope of their duties, Costa Mesa cannot be held liable to plaintiff.

e. City Attorney Kathe and Plaintiff Did Not Have an Attorney-Client Relationship.

Plaintiff's second and third causes of action in his proposed second amended complaint are for legal malpractice and breach of fiduciary duty against defendant City Attorney Kathe only. Plaintiff set out virtually identical causes of action in his original and first amended complaints. The demurrers to these causes of action were twice sustained, the second time without leave to amend. The trial court properly ruled that plaintiff's second amended complaint again fails to state a cause of action for legal malpractice and breach of fiduciary duty.

Plaintiff's second and third causes of action are against City Attorney Kathe only and in substance are indistinguishable from one another. Plaintiff alleges legal malpractice and breach of fiduciary duty arising from City Attorney Kathe's investigation and referral of the

plaintiff's activities. City Attorney Kathe exercised reasonable care in the representation of his client, the City of Costa Mesa, and breached no fiduciary duty to plaintiff.

The plaintiff implies in his proposed second amended complaint that City Attorney Kathe and the plaintiff had an attorney-client relationship. Plaintiff also contends that one of Kathe's duties was to represent city officials, including the plaintiff. Plaintiff, however, ignores that Costa Mesa was City Attorney Kathe's client and his duty was owed to the city.

In *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, the appellate court issued a writ of mandate ordering a trial court to vacate its order granting a county assessor's motion to disqualify county counsel from representing government employees in a civil suit by the county assessor. The county assessor's motion argued that allowing county counsel to represent the defendants would constitute a violation of California Rules of Professional Conduct 4-101, which provides that an attorney shall not accept employment adverse to a client or former client. The assessor contended that he and county counsel had an attorney-client relationship because county counsel was the legal representative of the assessor's office and allegedly counsel the assessor on personal legal matters. *Id.* at 27-28.

Although the Ward court found that Rule 4-101 applies to a government attorney, it concluded that county counsel's representation of the defendants did not constitute a violation of the rule. In so holding the court stated that "Los Angeles County Counsel has only one client, namely the County of Los Angeles." *Id.* at 32.

While county counsel was obligated to represent county officers in civil actions, that obligation only extended to matters in which the officers acted in their representative capacity and within the scope of their official duties. *Id.*

Ward found the relationship between county counsel and county officers to be analogous to that of a corporate attorney and officers and cited *Meehan v. Hopps* (1956) 144 Cal.App.2d 284 to support its holding that the assessor and county counsel had no attorney-client relationship. 70 Cal.App.3d at 32-33. In *Meehan,* a shareholders suit named Hopps, a former director, as a defendant. Hopps moved to disqualify corporate counsel from representing plaintiffs on the ground that Hopps had in the past turned over documents to corporate counsel that might be used against him in the suit. Hopps contended that he had an attorney-client relationship with corporate counsel.

Meehan found that the "attorney for a corporation represents it, its stockholders and its officer in their representative capacity. He nowise represents the officers personally." 144 Cal.App.2d at 290. The court found that the attorney's first duty was to the corporation. Disqualifying corporate counsel would preclude him from serving his client's interests. Ward found such reasoning persuasive in the case of a government attorney and public officers. Ward therefore found no attorney-client relationship between the assessor and county counsel. 70 Cal.App.3d at 34.

In addition to the well-reasoned holdings of *Ward* and *Meehan,* Government Code section 41805 provides that a city attorney charged with prosecutorial discretion

shall not represent any person accused of violating an ordinance of the city that employs the attorney. The city attorney can represent such a person only if the attorney is relieved of his or her prosecutorial duties by the city. Government Code § 41805(a)(1); *see People v. Pendleton* (1979) 25 Cal.3d 371; *People v. Rhodes* (1974) 12 Cal.3d 180; 70 Op.Atty.Gen. 271 (1987). Thus, as a matter of law, City Attorney Kathe was precluded from forming an attorney-client relationship with council member Amburgey concerning the conflict of interest charges.

Legal commentators also support the position that government attorneys are expected to report illegal behavior and corruption of public officials to the appropriate government agencies and officers.[1] *See. e.g.*, 94 Harv. L. Rev. 1244 1420 n.26 (1981); 89 Maine L. Rev. 155, 160 (1966); 37 Fed. B.J. 61, 70 (Fall 1978); 60 A.B.A.J. 1541, 1542 (1974). The Los Angeles City Attorney's Office reached a similar conclusion in a May 1987 opinion. Opinion No. 87-302. Thus to the extent a council member discusses alleged illegal behavior with the city attorney, a confidential relationship does not exist because of the city attorney's duty to disclose illegal conduct and corruption.

In the proposed second amended complaint, the only addition to the allegations for legal malpractice is a description of city attorneys' duties under Government Code section 41801. This section states that "the city attorney shall advise the city officials in all matters pertaining to city business." This provision in no way affects

---

[1] In fact, there is support for the position that a city attorney may be held criminally liable for failing to report violations of the Reform Act. See Government Code § 83116.5.

the analysis of the relationship between a city attorney and a city council person that led to the trial court to sustain the demurrer to the plaintiff's causes of action in his original and first amended complaints.

Plaintiff's complaint conveniently ignores the language of section 41801 that states that the city attorney's advice is restricted to "legal matters pertaining to city business." Nothing in section 41801 requires a city attorney to advise a city official of his or her legal rights when criminal charges against that official are contemplated. Section 41801 does not change the fact that the city attorney's client is the city and that the first duty is to the city.

City Attorney Kathe's first duty is to Costa Mesa. In fact, his conduct in fulfilling that duty is the exact conduct that plaintiff claims gives rise to his second and third causes of action. City Attorney Kathe was directed to determine whether city contracts complied with state and city requirements. Exposing a city attorney to civil liability for performing his or her duties might well have the effect of chilling that attorney's performance. The trial court properly concluded that plaintiff failed to state a cause of action for legal malpractice or breach of fiduciary duty because City Attorney Kathe and plaintiff did not have an attorney-client relationship. This ruling should be affirmed.

V. CONCLUSION

The trial court correctly concluded that plaintiff failed to alleged violation of a federally protected right. The court also concluded correctly that all defendants are entitled to absolute immunity for civil liability for their

actions. City Attorney Kathe was acting in a prosecutorial capacity at the time of the acts alleged in plaintiff's proposed second amended complaint. The acts of defendants Hornbuckle and Roeder were legislative in nature and they also are entitled to immunity. Finally, the trial court correctly ruled that City Attorney Kathe and plaintiff did not have an attorney-client relationship for purposes of his causes of action for legal malpractice and breach of fiduciary duty. Plaintiff has failed to demonstrate reversible error and the ruling of the trial court should be affirmed.

DATED: February 9, 1993

Respectfully submitted,

LAW OFFICES OF
EDWIN J. RICHARDS &
ASSOCIATES

BY: _____

MICHAEL M. McMAHON
EDWIN J. RICHARDS
Attorneys for Defendants
and Respondents,
CITY OF COSTA MESA,
THOMAS A. KATHE,
MARY HORNBUCKLE
and ALLAN ROEDER

PROOF OF SERVICE BY MAIL

In Re: RESPONDENTS' BRIEF; 4th Civil No. G013222
Caption: Orville Amburgey vs. City of Costa Mesa, et al.
Filed: IN THE COURT OF APPEAL, Fourth Appellate District, Division Three

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 311 South Spring Street, Suite 200, Los Angeles, California 90013. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Los Angeles, California, addressed as follows:

Lawrence K. Harvey, Esq.
Law Offices of
LAWRENCE K. HARVEY
Westerly Place
1500 Quail, Suite 440
Newport Beach, CA 92660

Michael F. Burns, Esq.
Law Offices of
BURNS & OBLACHINSKI
3403 Tenth Street, Suite 700
Riverside, CA 92501

GARY L. GRANVILLE, COUNTY CLERK
Orange County Superior Court
For: Hon. Randall L. Wilkinson, Judge
Courthouse, P.O. Box 838
700 Civic Center Drive West
Santa Ana, CA 92702

CLERK, CALIFORNIA SUPREME COURT
Second Floor, Room 2752
300 South Spring Street
Los Angeles, CA 90013
(5 Copies)

I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on February 12, 1993 at Los Angeles, California.

/s/ Donald Johnson D. JOHNSON

4th Civil No.
G013222

IN THE
Court of Appeal
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

ORVILLE AMBURGEY,
Plaintiff and Appellant,

vs.

CITY OF COSTA MESA, et al.,
Defendants and Respondents.

APPEAL FROM
SUPERIOR COURT OF ORANGE COUNTY
HONORABLE RANDALL L. WILKINSON, JUDGE
O.C.S.C. No. 66-92-03

RESPONDENTS' ADDITIONAL BRIEF

MICHAEL M. McMAHON
EDWIN J. RICHARDS

Law Offices of
EDWIN J. RICHARDS & ASSOCIATES

1055 North Main Street, Suite 922
Santa Ana, California 92701
(714) 558-7447

Attorneys for Defendants and Respondents
CITY OF COSTA MESA, THOMAS A. KATHE,
MARY HORNBUCKLE and ALLAN ROEDER

Lawyers Brief Service • Appellate Brief Printers •
(213 613-1013 • (714) 720-1510

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No. G013222

COURT OF APPEAL – FOURTH DISTRICT

DIVISION THREE

STATE OF CALIFORNIA

ORVILLE AMBURGEY,

Appellant,

vs. No. 66-92-03

CITY OF COSTA MESA, et al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
HONORABLE RANDALL L. WILKINSON, JUDGE

RESPONDENTS' ADDITIONAL BRIEF

I ARGUMENT

Respondents submit this additional brief to respond to several points raised for the first time in appellant's reply brief. Appellant's reply brief misstates appellant's position in several respects and contains factual errors. Respondents wish to address these points.

a. Plaintiff's Complaint Fails to Meet the "Stigma-Plus" Test of Paul v. Davis.

Appellant's reply brief cites *Kaprelian v. Texas Women's University*, 509 F.2d 133 (5th Cir. 1975), for the proposition that his "loss of employment" gives rise to a civil rights cause of action. *Kaprelian*, however, predates *Paul v. Davis*, 424 U.S. 693 (1976). The cited language from

Kaprelian does not withstand scrutiny under the subsequent United States Supreme Court decision in *Paul.* Whether through direct quotes of the case or indirectly through cases like *Kaprelian,* plaintiff continues to attempt to support his position with language from *Wisconsin v. Constantineau,* 400 U.S. 433 (1971). However, any language from Constantineau indicating that stigma alone brings due process into play was expressly disapproved in *Paul.*

Under *Paul,* plaintiff is required to show more than stigma to maintain an action for civil rights violation. Plaintiff has maintained that the something more is his loss of employment as a council member. Defendants, however, did not terminate or refuse to hire plaintiff. In his reply brief, plaintiff changes tactics and attempts to argue that the something more is injury to his business reputation. In support of this argument, plaintiff cites *Marrero v. City of Hialeah,* 625 F.2d 499 (5th Cir. 1980). Plaintiff's argument fails for two reasons.

First, and most importantly, plaintiff's proposed second amended complaint does not even allege injury to his business reputation. Plaintiff merely alleges loss of employment, injury to his chances of future election to office, and stigma to his "community reputation" (record p. 234). Plaintiff now attempts to add new allegations to his proposed second amended complaint after demurrers were twice sustained and the ruling affirmed on a motion for reconsideration.

Plaintiff's argument on this point also fails because simple allegations of injury to business reputation are insufficient even under *Marrero. Marrero* found that injury to the "goodwill" of a business was sufficiently tangible

to constitute the "plus" of the Paul "stigma-plus" requirement. 625 F.2d 499, 516 & n.22. The issue of whether injury to business reputation alone is sufficient was left open. *Id.*

Plaintiff next claims that a United States Supreme Court case finding a liberty interest is "strikingly similar" to the present action (reply brief p. 5, citing *Owen v. City of Independence,* 445 U.S. 635 (1980)). Plaintiff, however, ignores language in Owen that distinguishes the present action. In *Owen,* the allegedly defamatory remarks were made "in the course of the *termination of the employment.*" *Id.* As pointed out in respondents' brief, respondents did not terminate or refuse to rehire plaintiff.

Plaintiff's discussion of due process contains misstatements of respondents, arguments. Respondents do not contend that plaintiff failed to allege in his second amended complaint that state law remedies are inadequate. Respondents contend that plaintiff has alleged nothing more than a cause of action for a state law tort – defamation – and has attempted to turn it into a civil rights action.

b. City Attorney Kathe is Entitled to Immunity.

Plaintiff continues to state that he has alleged City Attorney Kathe acted as an investigator. City Attorney Kathe has never denied that he investigated plaintiff's activities. However, the point that plaintiff continues to ignore is that none of the activities allegedly giving rise to his cause of action were investigative. The two actions that plaintiff alleges injured him, reporting his activities to the press and releasing the information to the district

attorney, are closely related to the prosecutorial function. City Attorney Kathe is therefore entitled to absolute immunity under *Imbler v. Pachtman*, 424 U.S. 409 (1976).

c. Defendants Hornbuckle and Roeder are Entitled to Absolute Immunity.

Plaintiff has cited no support for the position that defendants Hornbuckle and Roeder are not entitled to absolute legislative immunity for the acts he alleged injured him. These defendants are entitled to absolute immunity under *Tenney v. Bradhove*, 341 U.S. 367 (1951), and subsequent cases extending legislative immunity to regional and municipal officials.

d. This Appeal Should be Dismissed.

Plaintiff attempts to appeal from the order sustaining the demurrer without leave to amend. Such an order is not appealable. Plaintiff argues that this court should exercise its discretion to deem the order sustaining the demurrer without leave to amend to incorporate an order of dismissal. Defendants request that the court dismiss plaintiff's appeal.

II. CONCLUSION

Appellant's reply brief contains numerous misstatements of fact and law. A close review of the plaintiff's proposed second amended complaint will reveal that plaintiff has failed to state a cause of action for civil rights violation. Plaintiff has failed to identify a federally protected right that was allegedly violated. Plaintiff seeks to disguise a defamation cause of action as a claim for

civil rights violation. Additionally, sound public policy concerns underlie the grant of absolute immunity to all defendants in this action. Neither prosecutors nor legislators should be hampered in making decisions by the threat of civil litigation. The trial court in this action properly found that plaintiff failed to state a cause of action and that defendants were immune from liability. This ruling should be affirmed.

DATED: April 5, 1993

Respectfully submitted,

LAW OFFICES OF
EDWIN J. RICHARDS & ASSOCIATES

By: /s/ Michael M. McMahon
MICHAEL M. McMAHON
EDWIN J. RICHARDS
Attorneys for Defendants and Respondents, CITY OF COSTA MESA, THOMAS A. KATHE, MARY HORNBUCKLE and ALLAN ROEDER

PROOF OF SERVICE BY MAIL

In Re: RESPONDENTS' ADDITIONAL BRIEF; 4th Civil No. G013222

Caption: Orville Amburgey vs. City of Costa Mesa, et al.

Filed: IN THE COURT OF APPEAL, Fourth Appellate District, Division Three

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the City and County of Los Angeles; I am over the age of eighteen yeas and not a party to the within action; my business address is: 311 South Spring Street, Suite 200, Los Angeles, California 90013. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Los Angeles, California, addressed as follows:

Lawrence K. Harvey, Esq.
Law Offices of
LAWRENCE K. HARVEY
Westerly Place
1500 Quail, Suite 440
Newport Beach, CA 92660
(Attorneys for Plaintiff,
ORVILLE AMBURGEY)

Michael F. Burns, Esq.
Law Offices of
BURNS & OBLACHINSKI
3403 Tenth Street, Suite 700
Riverside, CA 92501
(Co-Counsel for Plaintiff,
ORVILLE AMBURGEY)

GARY L. GRANVILLE,
COUNTY CLERK
Orange County Superior Court
For: Hon. Randall L. Wilkinson, Judge
Courthouse, P.O. Box 838
700 Civic Center Drive West
Santa Ana, CA 92702

CLERK, CALIFORNIA SUPREME CT.
Second Floor, Room 2752
300 South Spring Street
Los Angeles, CA 90013
(5 Copies – Hand Delivered)

I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on April 6, 1993 at Los Angeles, California.

/s/ Donald Johnson D. JOHNSON

APPENDIX C

LAW OFFICES OF
EDWIN J. RICHARDS AND ASSOCIATES
A PROFESSIONAL CORPORATION

1055 NORTH MAIN STREET, SUITE 922
SANTA ANA, CALIFORNIA 92701
TELEPHONE (714) 558-7447
FAX (714) 558-7605

August 4, 1993

California Court of Appeal
Fourth Appellate District
Division Three
925 North Spurgeon Street
Santa Ana, CA 92701-3700

Re: Amburgey v. City of Costa Mesa
Case No. G013222

RESPONDENTS' LETTER BRIEF

The court has requested that the parties submit letter briefs addressing the court's intent to dismiss this appeal on the ground that it appeared to be improperly taken from a non-appealable order sustaining a demurrer without leave to amend. Since the respondents received that request, they have learned that the superior court has entered a final order dismissing the action. Respondents respectfully request that the court take judicial notice of this order and incorporate it with the papers related to this appeal. Respondents would also request that the court deem this appeal to have been taken from the order dismissing the action.

Although an order sustaining a demurrer without leave to amend is a non-appealable order, the court has

discretion to deem the appeal taken from a subsequent order dismissing the case. *Edgren v. Regents of University of California* (1984) 158 Cal. App. 3d 515. Such discretion can be exercised in the interests of judicial economy. *Id.* In the present action both appellant and respondents have thoroughly briefed the law of the case. A significant amount of time and effort has been expended by both sides in this appeal. Respondents respectfully request that the court consider the substantial savings to the already overburdened court system that would result if the court were to allow this appeal to proceed.

Appellant's letter brief and a subsequent letter to the Court of Appeal have directed the court's attention to the recent case *Buckley v. Fitzsimmons* (1993) 93 D.A.R. 7962. Appellant, however, has failed to address the relevance, if any, of this case to the present appeal. Because appellant has failed to identify a federal civil right that was allegedly violated by respondent City Attorney Kathe, the *Buckley* decision should have no bearing on this appeal. Even assuming the court reaches the issue of prosecutorial immunity, *Buckley* can be distinguished on the bright line drawn by the Supreme Court; that is, City Attorney Kathe was acting in his prosecutorial capacity because he had probable cause to have appellant arrested. *See Buckley*, 93 D.A.R. at 7965 (stating that a prosecutor is not an advocate until he has probable cause to have someone arrested).

Respectfully submitted,

/s/ Michael M. McMahon
MICHAEL M. McMAHON
Attorney for Respondents

MMM/dld

cc: Michael F. Burns, Esq.
LAW OFFICES OF BURNS & OBLACHINSKI
3403 Tenth Street, Suite 700
Riverside, CA 92501

Lawrence K. Harvey, Esq.
LAW OFFICES OF LAWRENCE K. HARVEY
Westerly Place
1500 Quail, Suite 440
Newport Beach, CA 92660

APPENDIX D

No. G013222

COURT OF APPEAL – FOURTH DISTRICT
DIVISION THREE
STATE OF CALIFORNIA

ORVILLE AMBURGEY,

Appellant,

vs. No. 66-92-03

CITY OF COSTA MESA, et al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF
ORANGE COUNTY
HONORABLE RANDALL L. WILKINSON, JUDGE

ANSWER TO PETITION FOR REHEARING

(Filed Dec. 13, 1993)

Edwin J. Richards BAR #43855
Law Offices of
Edwin J. Richards & Associates
1055 North Main Street, Suite 922
Santa Ana, California 92701
(714) 558-7447

Attorneys for Defendants and
Respondents, CITY OF COSTA MESA,
THOMAS A. KATHE,
MARY HORNBUCKLE
and ALLAN ROEDER

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No. G013222

COURT OF APPEAL – FOURTH DISTRICT
DIVISION THREE
STATE OF CALIFORNIA

ORVILLE AMBURGEY,

Appellant,

vs. No. 66-92-03

CITY OF COSTA MESA, et al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
HONORABLE RANDALL L. WILKINSON, JUDGE

ANSWER TO PETITION FOR REHEARING

INTRODUCTION

Petitioner seeks rehearing of the Appellate Court's decision upholding respondents' demurrer to plaintiff and appellant AMBURGEY's complaint for damages. It is petitioner's contention that the Court failed to address key factual issues and legal decisions which petitioner claims establish AMBURGEY's right to maintain his causes of action in this case as a matter of law. (AMBURGEY petition, p.1.) However, petitioner fails entirely to support his contentions and, likewise, fails to appreciate that all factual matters and pertinent legal decisions were considered in detail by the Court of Appeal. Respondents

respectfully submit that AMBURGEY's petition for rehearing is unnecessary, unwarranted, and amounts to a reargument of his opening and reply briefs without due respect for the Court's detailed consideration of all matters herein on appeal. For this reason respondents request that AMBURGEY's petition for rehearing be denied.

DISCUSSION

I.

FACTS OF THE CASE

The gravamen of AMBURGEY's original complaint and first amended complaint was that respondents injured him by reporting apparent criminal violations to the district attorney and the press. The trial court ruled AMBURGEY's causes of action for violation of civil rights under 42 U.S.C. 1983, 1988, failed to allege any violation of a federally protected right. The trial court also ruled that the Costa Mesa city attorney, Kathe, was entitled to absolute immunity from any wrongdoing alleged by AMBURGEY, and that the mayor and city manager were also entitled to absolute legislative immunity. The judgment of the trial court was upheld herein on appeal. (Court's Opinion, p. 17.)

The Court of Appeal specifically held that AMBURGEY failed to state a cause of action under 42 U.S.C. 1983, 1988, because he failed to allege a deprivation of a right, immunity or privilege guaranteed under federal law. (Court's Opinion, p. 6.) The Court found that AMBURGEY's subjective expectancy of continued employment as a council member did not rise to the level of property

interest (an "entitlement" to employment) required to state a cause of action under section 1983. (Court's Opinion, p. 6.) In addition, the Court held that a mere allegation of defamation caused by a governmental official does not give rise to a cause of action for civil rights violations without a showing that the plaintiff was stigmatized and that he was also deprived of a state law right or status. (Court's Opinion, p. 7.) The Court determined that facts plead in AMBURGEY's complaint demonstrated AMBURGEY was merely voted out of office by the voters of the City of Costa Mesa, and no federally protected right was infringed upon.

Once the Court determined AMBURGEY failed to sufficiently plead a cause of action for a federally protected right, the issue of whether the respondent city officials were protected by an absolute immunity, or only a qualified immunity, for the alleged violations becomes irrelevant. Nevertheless, it is this part of the Court of Appeal's opinion that AMBURGEY takes issue with and erroneously states is a viable basis for rehearing.

II.

AMBURGEY FAILS TO STATE GROUNDS FOR REHEARING

Authority to grant a rehearing is conferred by California Rules of Court, Rule 27. A rehearing, however is not an opportunity to reargue the cause and will not be granted absent a substantial error by the Court, the correction of which would likely produce a different result. The Court is likewise vested with broad power to modify

the Court's opinion without grant of a petition for rehearing. (Cal. Cts. of App. Int. Op. Prac. & Pro.) Petitioner AMBURGEY claims a rehearing is warranted on three grounds: that the Court's opinion misstated material facts, that the Court failed to consider relevant case law, and that the Court did not provide an appropriate rationale for its decision. (Appellant's Petition, p. 1-2.) Respondents submit this is patently false.

A. THE COURT DID NOT MISSTATE A MATERIAL FACT.

In his complaint, AMBURGEY alleged that the Costa Mesa city attorney, Kathe, assisted other defendants in producing and forwarding false evidence to the district attorney and to the press regarding alleged criminal misconduct by AMBURGEY and released this falsified information to the press thereafter. (Appellant's Petition, p. 2.) Petitioner claims the Court of Appeal misstated this "material" fact. (Appellant's petition, p. 2, line 12.) However, the Court clearly recognized AMBURGEY's allegation and reiterated it precisely:

> Although Amburgey claims Kathe's investigative activities damaged him, the complaint alleges only that Kathe and others disclosed the results of their investigation to the press and turned over their results to the district attorney. (Court's Opinion, p. 12.)

It is obvious the Court stated AMBURGEY's allegation exactly. Respondents respectfully contend that AMBURGEY has merely attempted to mask his displeasure with the Court's *result* under the guise of an alleged

misstatement of fact. Since the Court did not err, the petitioner has produced no ground for rehearing on this basis.

B. THE COURT DID NOT FAIL TO CONSIDER RELEVANT CASE LAW.

Respondents suggest that AMBURGEY's true objection to the Court's opinion lies in the Court's conclusion that the actions of Kathe, the city attorney, were *not investigative* but were "part and parcel" of the decision by the city attorney to initiate a prosecution as authorized by the Government Code and the Costa Mesa Municipal Code. (Court's Opinion, p.12 relying on *Imbler v. Pachtman* (1976) 424 U.S. 409; Appellant's Petition, p. 2, line 25.)[1] Petitioner erroneously concludes the Court has disregarded the recent decision in *Buckley v. Fitzsimmons* (1993) 113 S.Ct. 2606, in reaching this conclusion. AMBURGEY claims this constitutes grounds for rehearing.

However, AMBURGEY fails to realize the Court's opinion need not address every specific point raised by the parties, so long as the written opinion states the *essential facts* and briefly discusses the *essential legal issues presented.* (*People v. Rojas* (1981) 118 Cal.App.3d 278, 289-290.) The Court may dispose of meritless contentions

---

[1] The Court also ruled that Mayor Hornbuckle and City Manager Roeder were absolutely immune from civil liability for any and all acts alleged by plaintiff. (Court's Opinion, p. 14, relying on *Tenney v. Brandhove* (1951) 341 U.S. 367, 379.)

by noting that these points lack sufficient merit to warrant further discussion. (*People v. Rojas, supra*, p. 290; see also *Linhart v. Nelson* (1976) 18 Cal. 3d. 641, 645.) The Court has clearly done so in this case.

The Court specifically recognized that city attorney, Kathe, was authorized by Government Code sections 91001.5 and 41803.5 to prosecute violation of the Political Reform Act and to prosecute misdemeanor violations, and was similarly empowered by the Costa Mesa Municipal Code section 2-401, 2-408, and 1-33 to enforce conflict of interest laws; however, the Court *disputes* that Kathe's actions were "investigative" in nature as plaintiff alleges. The Court clearly states Kathe's actions fell well within his prosecutorial decision making duties and were specifically *not* investigative. (Court's Opinion, p. 13).

The Court further states that although AMBURGEY labeled Kathe's actions "investigative" in his complaint, AMBURGEY "failed to state *facts* sufficient to overcome the absolute immunity" granted the prosecutor. (Court's Opinion, p. 14, fn. 4, emphasis added). The Court then disposed of AMBURGEY's meritless contention by commenting that AMBURGEY's allegation was but a "thinly veiled attempt to disguise a cause of action for malicious prosecution for which a prosecutor is absolutely immune." (Court's Opinion, p.13, fn. 4.)

The Court, therefore, had no obligation to discuss *Buckley* in detail as the *Buckley* decision concerns actions of a state prosecutor absolutely immune from prosecution (consistent with *Imbler v. Pachtman* (1976) 424 U.S. 409, cited by the Court herein) *and* extra-prosecutorial actions

for which the prosecutor is to receive a qualified immunity. (*Buckley, supra.,* 113 S.Ct. 2606.) Since the Court determined AMBURGEY's actions were *not* extra-prosecutorial, further discussion of the *Buckley* decision was not relevant. Again, the Court has no duty to address an issue it considers meritless. (*People v. Rojas, supra,* 18 Cal.App.3d 278, 289-290.)

Further, the Court took great pains to consider the instant issue thoroughly. On July 27, 1993, by letter brief AMBURGEY requested the Court consider the recent decision in *Buckley v. Fitzsimmons, supra,* 113 S.Ct. 2606. On August 4, 1993, respondents responded to AMBURGEY's letter brief, questioning the relevance of the *Buckley* decision and stating respondents' position that *Buckley* was clearly distinguishable. Thereafter, on October 29, 1993, the Court ordered the matter resubmitted for an additional 60 days to allow members of the panel to study the circulating opinion and draft separate opinions should they desire. Notwithstanding the Court's painstaking efforts to study all matters thoroughly, petitioner remains unconvinced the Court did so. However, petitioner's displeasure with the Court's efforts are not grounds for rehearing.

C. THE COURT DID NOT FAIL TO GIVE ADEQUATE RATIONALE FOR ITS DECISION.

As the Court clearly indicates in its Opinion, in ruling on an order sustaining a demurrer without leave to amend, the Court must determine whether the complaint states any cause of action even though the plaintiff's complaint may be intermingled with irrelevant facts or

demands relief to which plaintiff is not entitled. (Court's Opinion, p. 4, citing *Matteson v. Wagoner* (1905) 147 Cal. 739, 742; and *Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1043.) In their seventeen page opinion, the Court has properly analyzed all AMBURGEY's contentions in great detail.

It is the appellant's burden on appeal to have demonstrated that the trial judge abused his discretion in denying leave to amend a complaint. The appellant must also demonstrate how the complaint could have been amended to state a cause of action. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) The requisite showing may be made for the first time on appeal. (California Code of Civil Procedure, Section 472(c); *Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 971.)

AMBURGEY, has, therefore, had ample opportunity to plead viable causes of action in this case, yet he has failed to do so. He may not now request a rehearing in an attempt to get a "second bite out of the apple" before the appellate justices. A rehearing is not an opportunity for a disappointed party to reargue on appeal or to undo mistakes. AMBURGEY by his petition herein has failed not only to identify a substantial error made by the Court of Appeal, but has failed to identify any error at *all* which would warrant a rehearing.

III.

CONCLUSION

For the foregoing reasons, respondents respectfully request AMBURGEY's petition for rehearing be denied.

DATED: December 9, 1993

Respectfully submitted,

LAW OFFICES OF
EDWIN J. RICHARDS & ASSOCIATES

BY: /s/ Edwin J. Richards
EDWIN J. RICHARDS
Attorneys for Defendants and Respondents,
CITY OF COSTA MESA,
THOMAS A. KATHE,
MARY HORNBUCKLE
and ALLAN ROEDER

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 1055 North Main Street, Suite 922, Santa Ana, California 92701.

On December 13, 1993, I served the foregoing document described as:

ANSWER TO PETITION FOR REHEARING

upon the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as described below.

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Santa Ana, California. The envelope was mailed with postage fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed December 13, 1993, at Santa Ana, California.

/s/ Dana L. Dalpiaz
DANA L. DALPIAZ

SEE ATTACHED MAILING LIST

APPENDIX E

S036968
G013222

IN THE
Supreme Court
OF THE STATE OF CALIFORNIA

ORVILLE AMBURGEY,

Plaintiff and Appellant,

vs.

CITY OF COSTA MESA, et al.,

Defendants and Respondents.

ANSWER TO PETITION FOR REVIEW

(Filed Jan. 13, 1949)

AFTER A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE

LAW OFFICES OF
EDWIN J. RICHARDS & ASSOCIATES

EDWIN J. RICHARDS, No. 43855

1[illegible] North Main Street, Suite 922
Santa Ana, California 92701-3620
(714) 558-7447

Attorneys for Defendants and Respondents
CITY OF COSTA MESA

Lawyers Brief Service • Appellate Brief Printers •
(213) 613-1013 • (714) 720-1510

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IN THE

SUPREME COURT OF CALIFORNIA

ORVILLE AMBURGEY, Plaintiff/Appellant, vs. CITY OF COSTA MESA, ET AL., Defendants/ Respondents.	NO _____ Court of Appeal: 4CIV G013222 Orange County Superior Court No. 669203 RESPONDENTS' ANSWER TO PETITION FOR REVIEW

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant and respondent CITY OF COSTA MESA hereby answers plaintiff/appellant's Petition for Review as follows:

INTRODUCTION

The very nature of California Supreme Court review is to decide important legal questions and maintain statewide harmony and uniformity of decision. The supreme courts' focus is not on correction of error by the court of appeal in a specific case. *People v. Davis* (1905) 147 Cal. 346, 348; Sup. Ct. Prac. & Pro. (1990 Rev.) sec. 1, p. 1.)

The grounds for supreme court review as prescribed by *California Rules of Court*, Rule 29, reflect the narrow scope of supreme court review of an appellate decision:

> "Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges." (Cal.Rules Ct., Rule 29.)

Appellant's petition for review herein purports to present issues worthy of supreme court review; however, the actual substance of the issues presented do not demonstrate the existence of appropriate grounds for granting review.

LEGAL DISCUSSION

I.

AMBURGEY DOES NOT CITE APPROPRIATE GROUNDS FOR SUPREME COURT REVIEW

A. The Issue of Whether the City Prosecutor had Absolute Immunity for Information Released to the Press is not Worthy of Supreme Court Review.

Petitioner's primary issue presented for review is whether a prosecutor has absolute immunity when issuing press releases. (Pet.Rev., p. 5.); however, petitioner fails entirely to demonstrate why review of this issue is necessary to secure uniformity of decisions in California,

or why this is a question of law necessitating immediate consideration by the California Supreme Court.

In fact, petitioner admits "there have been *no* California Court decisions dealing with the issue of prosecutorial immunity at press conferences." (Pet.Rev, p. 6, emphasis added.) Where no decisions exist, there can, necessarily, be no conflict of decisions worthy of review.

Further, petitioner correctly states California decisions addressing prosecutorial immunity have based their rationale on the United States Supreme Court case of *Imbler v. Pachtman* (1976) 424 U.S. 409 and the D.C. circuit court case of *Briggs v. Goodwill* (D.C. Cir. 1977) 569 F.2d 10.

Petitioner thereafter contends that after the U.S. Supreme Court decision in *Buckley v. Fitzsimmons* (1993) 113 S.Ct. 2606, "California law is unclear" as to whether a prosecutor is absolutely immune when issuing press releases. (Pet.Rev., p. 7.) However, petitioner's contention is entirely without merit as the *Buckley* decision did not overrule the U.S. Supreme Court case of *Imbler* nor did it overrule *Briggs*. The *Buckley* decision merely clarified a specific area of law addressing prosecutorial immunity where alleged wrongful conduct of a prosecutor resulted in a recognized profound and egregious violation of a federally protected right to liberty.

Petitioner's apparent confusion on the issue of prosecutorial immunity in this context hinges on petitioner's failure to appreciate that the true issue in the case herein on appeal is whether AMBURGEY's complaint and first amended complaint alleged sufficient facts to constitute *any* violation of a federally protected right pursuant to 42

U.S.C. 1983, or 1988, and only secondarily, whether city officials were protected by an absolute immunity for acts allegedly causing the deprivation of a federally protected right.

The Court of Appeal specifically held that AMBURGEY's complaint *failed* to state *any* cause of action under 42 U.S.C. 1983, or 1988. AMBURGEY failed to adequately allege deprivation of any right, immunity or privilege guaranteed under federal law. (Court's Opinion, attached hereto as Exhibit "A," p. 6.) Without first establishing the violation of a federally protected right, the issue of whether governmental officials should be granted absolute or partial immunity for acts allegedly leading to a deprivation of a civil right becomes irrelevant, moot, and purely academic. It is not the function of the supreme court to entertain issues in review that are not critical questions of law or invite speculation on the law. Nevertheless, by the presentation of his primary issue for review, petitioner persists in his quest to have the high court do just that.

It is important to note that the *Buckley* decision made a preliminary critical assumption that cannot be made in the case at bar: that a constitutional violation *had* occurred for which 28 U.S.C. 1983 provides a remedy. In *Buckley,* Buckley commenced his action after being incarcerated for three years with a loss of liberty – a clearly protected right. He alleged that the incarceration was a result of the false and defaming statements made by the prosecutor. There are no such facts in the case at bar, and the Court of Appeal correctly found that AMBURGEY failed to allege any deprivation of a right, immunity or

privilege guaranteed under the federal law. (Court's Opinion).

It is also important to note that in *Buckley* the complaint alleged that the prosecutors fabricated false evidence and made false statements for the purpose of securing the *prosecutors* reelection. Based upon that finding, the Court concluded that the statements by the prosecutors were made exclusively for personal gain of the prosecutors, i.e., their reelection. (Buckley v Fitzsimmons, *supra*, 113 S.Ct. 2606.) There was no such ulterior motive in AMBURGEY because it was Amburgey who was standing for reelection, not the prosecutor. The Court of Appeal correctly concluded that the city attorney's disclosure of the results of his investigation to the press fell well within his duties as a prosecutor and was intimately associated with his duty to initiate a prosecution as authorized by the Government Code and the Costa Mesa Municipal Code. (Ct. Opin., p.12).

Based upon the above it is clear that the facts of the *Buckley* case are clearly distinguishable from the facts in *AMBURGEY.*

The Court of Appeal was fully cognizant of the *Buckley* decision. It was brought to the Court's attention on two occasions: by petitioner's letter brief on July 27, 1993, and again by petitioner's motion for rehearing which was denied by the Court of Appeal on December 16, 1993. (Court of Appeal order attached hereto as Exhibit "A".) The Court of Appeal is vested with the discretion to modify any opinion to correct their opinion where warranted. (*Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713, 721.) The Court of Appeal, however,

made no modification to its opinion whatsoever. Petitioner, has therefore, presented absolutely no compelling reason why the California Supreme Court should grant review based on this issue.

B. The Issue of Whether the Prosecutors Acts in Furtherance of his Role as a Prosecutor were "advocatory" or "investigatory" in Nature is not worthy of Supreme Court Review.

The second issue petitioner raises that allegedly warrants supreme court review again arises out of the *Buckley* decision. Petitioner erroneously contends the issue of what constitutes acts of "investigation" by a prosecutor and acts of advocacy for which the prosecutor would be absolutely immune requires supreme court review. (Pet.Rev., p. 6.) In the context of the instant case, it is petitioner's contention that

> "after *Buckley*, California law is unclear as to whether a city attorney's acts of interviewing witnesses, reviewing city documents, records and minutes, and taking statements from witnesses constitute investigative acts or initiation of prosecution." (Pet.Rev., p. 9.)

Once again, petitioner admits, "there are no California cases that address these issues," (Pet.Rev., p. 6.), hence, again, there can be no conflict in case law worthy of supreme court review to insure uniformity of case law on this issue.

Further, resolution of the issue of what constitutes an act of investigation versus an act of advocacy by a prosecutor does not address an issue of vital public policy or

involve a matter significantly affecting the administration of justice within the state of California, particularly since a long line of U.S. supreme court cases has addressed this very issue and set forth well delineated criteria for the same. (see *Imbler v. Pachtman* (1976) 424 U.S. 409.)

> In *Imbler v. Pachtman, supra,* 424 U.S. 409, the U.S. Supreme Court specifically held that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom . . . " (*Imbler v. Pachtman, supra.,* 424. U.S. 409, 434.)

All of these acts are entitled to absolute immunity as they are all fairly within the prosecutor's function as an advocate. (*Imbler v. Pachtman, supra,* 424 U.S. 409, 431, fn. 33, 430, fn. 32.) This concept was again, reiterated and acknowledged in the *Buckley* decision itself. (*Buckley v. Fitzsimmons, supra,* 113, S.Ct. 2606.)

The court in *Buckley* specifically stated:

> "We have not retreated . . . from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." (*Buckley v. Fitzsimmons supra,* 113, S.Ct. 2606.)

Herein, the Court of Appeal determined that the acts of the city attorney, Kathe, as plead in AMBURGEY's complaint were not investigatory and justified the grant of absolute immunity. The Court of Appeals determined Government Code section 91001.5 granted the city attorney the power to prosecute violations of the Political

Reform act; section 41803.5 authorized him to prosecute misdemeanor violations which occur in his city, and the Costs Mesa Municipal Code sections 2-401 and 2-408, empowered the city attorney to prosecute criminal violations of any conflict of interest provisions of the Government Code. (Ct. Opinion, pp.11-12.) In fact, the Court of Appeal determined *the very allegations of AMBURGEY's own complaint compelled the conclusion that city attorney Kathe was acting solely as a prosecutor, and not as an investigator.* (Ct. Opinion. p.12.)

Therefore, petitioner's urging that the supreme court should decide the *factual issue* of whether the city attorney's interview of witnesses, reviewing city documents, records and minutes and taking statements from witnesses constituted advocacy or investigation is clearly misplaced. Issues of fact are to be determined by the Court of Appeal, which they have clearly done in this case.

C. AMBURGEY's Right to Maintain his Elected Council Seat is not a Federally Protected Right Warranting Supreme Court Review.

Lastly, petitioner requests the supreme court grant review of the issue of whether "a city councilman running for election, had a federally protected right to be free from the stigma of false accusation of criminal conduct." (Pet.Rev. p.6).

This final issue also does not in any manner demonstrate a significant conflict of state law on the issue, nor does it warrant review by the California Supreme Court based on an issue of vital public policy or an issue

significantly affecting the administration of justice in the state.

The issue petitioner presents has been clearly addressed and discussed at length by the Court of Appeal on the basis of long standing federal law. The Court of Appeal clearly stated that AMBURGEY failed to state a cause of action under 42 U.S.C. 1983, or 1988, because he failed to allege a deprivation of a right, immunity or privilege guaranteed under federal law. (Court's Opin. p.6.) The Court of Appeal determined that AMBURGEY's subjective expectancy of continued employment as a council member did not rise to the level of a property interest (an "entitlement" to employment) required to state a cause of action under federal law. (Court's Opin., p.6.) In addition, the Court of Appeal held that a mere allegation of defamation caused by a governmental official does not give rise to a cause of action for civil rights violations without a showing that the plaintiff was stigmatized and that he was also deprived a state law, right, or status. (Court's Opin.p. 7.)

Petitioner erroneously states, without cited authority, that his reputation is "federally protected right." (Pet. Rev. p. 10). Clearly, this is not the case. In *Paul v. Davis* (1976) 424 U.S. 693, the U.S. Supreme Court held that a plaintiff could *not* bring suit for an alleged violation of a constitution right where there was an absence of governmental action which deprived the plaintiff of a right held under state law.

In *Paul,* a local police chief distributed flier to local merchants showing plaintiff's photo and (falsely) labeled plaintiff as an active shoplifter. The Court found that

reputation alone was not a constitutionally protected "liberty" or "property" interest. (*Paul v. Davis, supra,* 424 U.S. 693.) In *Paul v. Davis, supra,* 424 U.S. 693, the shoplifting flier, although potentially detrimental to plaintiff's reputation, did not alter a pre-existing state right.

In AMBURGEY's case, the Court of Appeal correctly held that a mere subjective expectancy of reelection and continued employment does not give rise to a property interest for purposes of the due process clause under 42 U.S.C. 1983. (*Jones v. Hopper* (10th Cir. 1969) 410 F.2d 1323, 1329.) An employee must have an "entitlement" to employment before it can be said that he has a protected property interest therein. Certainly, AMBURGEY was not entitled to maintain council seat as evidenced by the pending election to replace or renew council members at the discretion of the citizens of Costa Mesa.

Despite AMBURGEY's protestations that Cal.Gov.Code section 34883 et seq. "recognizes employment, reputation, business goodwill, and the right to hold elected office" as significant property interests (Pet.Rev., p. 10), the statutes he cites and the case cited in support of this contention, *Willis v. Santa Ana Hosp.* (1962) 58 Cal 2d. 806, do *not* stand for the proposition that a city councilman has a significant property interest in the right to hold an elected office. Much to the contrary, in *Willis v Santa Ana Hosp. supra,* 58 Cal.2d 806, the court urged a balancing test weighing the rights of the plaintiff against public interest and did not in any manner address the rights of a city official, nor an elected office.

Willis involved a private osteopathic physician deprived of hospital privileges as a result of a conspiracy

contrived by other doctors which was designed to restrain competition and deprive Willis of his practice in order to benefit competing members of the conspiracy. (*Willis v. Santa Ana Hosp, supra,* 58 Cal. 2d 806, 810.) The court held that an action will lie at common law in California where a right to pursue an occupation or trade is intentionally interfered without sufficient justification. This must be determined in light of all circumstances, the respective importance to society, and the importance of protecting the activity interfered with. (*Willis v. Santa Ana Hosp, supra,* 58 Cal. 2d. 806, 810.)

Certainly, AMBURGEY cannot credibly maintain that the U.S. Supreme Court rulings in *Imbler v. Pachtman* (1976) 424 U.S. 409, which emphasizes the strong public policy mandating absolute immunity from civil liability for a public prosecutor is superseded by the decision in *Willis v. Santa Ana Hosp. supra,* 58 Cal. 2d 806.

As the U.S. Supreme Court emphasized in *Paul v. Davis, supra,* 424 U.S. 793, 600-701, damage to reputation without more, does not rise to the level of a constitutional violation. (*Id.,* pp. 702-711.) Here, as in *Paul,* absolutely no governmental action deprived AMBURGEY of a right held under state law or extinguished that right.

Simply put, AMBURGEY continues to pursue creation of a federal civil rights issue herein by reasserting a tenuous link between the "stigma" he claims he suffered and the loss of his city council seat. The Court of Appeals was clear that AMBURGEY was not deprived of a right granted by state law by governmental intervention. AMBURGEY, therefore, seeks herein, review of an issue with no basis in law.

CONCLUSION

Respondents respectfully submit that none of the issues raised in AMBURGEY's Petition for Review support a valid basis for Supreme Court review. Wherefore, respondents respectfully request that AMBURGEY's petition for review be denied.

Respectfully submitted,

EDWIN J. RICHARDS &
ASSOCIATES

By /s/ Edwin J. Richards
Edwin J. Richards
Attorneys for
Respondents

EXHIBIT "A"

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
Division Three

AMBURGEY, ORVILLE

v.

THE CITY OF COSTA MESA

(Filed Dec. 16, 1993)

G013222
Orange County No. 669203

THE COURT:

The petition for rehearing is DENIED.

H. MOORE, J.
Acting Presiding Justice

We Concur:

WALLIN, J.
Justice

CROSBY, J.
Justice

cc: Orange County Clerk
All Counsel

PROOF OF SERVICE BY MAIL

In Re: ANSWER TO PETITION FOR REVIEW; No. S036968
Caption: Orville Amburgey vs. City of Costa Mesa, et al.
Filed: IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 311 South Spring Street, Suite 200, Los Angeles, California 90013. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Los Angeles, California, addressed as follows:

Michael F. Burns, Esq.
BURNS & OBLACHINSKI
3403 Tenth Street, Suite 700
Riverside, CA 92501 (Attorneys for Plaintiff and Appellant)

A. J. Pyka, Esq.
KINKLE, RODIGER & SPRIGGS
837 North Ross Street
P.O. Box 1558
Santa Ana, CA 92702 (Courtesy Copy)

GARY L. GRANVILLE, COUNTY CLERK
Orange County Superior Court
For: Hon. Randall Wilkinson, Judge
Courthouse, P.O. Box 838
700 Civic Center Drive West
Santa Ana, CA 92702

CLERK, COURT OF APPEAL
Fourth Appellate District
Division Three
925 North Spurgeon Street
Santa Ana, CA 92701

I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on January 13, 1994 at Los Angeles, California.

/s/ Donald Johnson D.JOHNSON

APPENDIX F

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

42 U.S.C. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. 1988. Proceedings in vindication of civil rights; attorney's fees; expert fees

(a) Applicability of statutory and common law.

The jurisdiction in civil and criminal matters conferred on the district courts, by the provisions of this Title, and the Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections, 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fees.

California Government Code § 815.2

§ 815.2. Injuries by employee within scope of employment; immunity of employee

(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

California Government Code § **41801. Legal advise**

The city attorney shall advise the city officials in all legal matters pertaining to city business.

***California Government Code* § 41805. Representation of defendants in criminal matters; conditions; private practice by attorney employee of city**

(a) No city attorney who does not, in fact, exercise prosecutorial responsibilities on behalf of the city or cities by which he is employed shall be precluded from defending or assisting in the defense of, or acting as counsel for, any person accused of any crime except for violation of any ordinance of the city or cities by which he is employed, provided that:

(1) The city or cities by which he is employed expressly relieve him of any and all prosecutorial responsibilities on its or their behalf; and

(2) The accused has been informed of and expressly waives any rights created as a result of any potential conflict created by his attorney's position as a city attorney.

(b) Where the above provisions are met, no partner or associate of a city attorney shall be prevented from defending or assisting in the defense of, or acting as counsel for, any person accused of any crime except for violations of any ordinance of the city or cities by which his partner or associate is employed as a city attorney.

This section shall not preclude any city from limiting or prohibiting the private practice of any attorney it retains or employs.

***California Government Code* § 87100. Public officials; state and local; financial interest**

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

***California Government Code* § 87103. Financial interest in decision by official**

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official of a member of his or her immediate family or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars ($1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars ($250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor or, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars ($250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

***California Government Code* § 91000. Violations; fined; limitations**

(a) Any person who knowingly or willfully violates any provision of this title is guilty of a misdemeanor.

(b) In addition to other penalties provided by law, a fine of up to the greater of ten thousand dollars ($10,000) or three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received may be imposed upon conviction for each violations.

(c) Prosecution for violation of this title must be commenced within four years after the date on which the violation occurred.

Costa Mesa Municipal Code § 2-401. Purpose.

Pursuant to the provisions of Government Code section 87300 et seq., the City of Costa Mesa hereby adopts the following conflict of interest code. Nothing contained herein is intended to modify or abridge the provision of the "Political Reform Act of 1974" (Government Code section 8100). The provisions of this code are additional to Government Code section 87100 and other laws pertaining to conflicts of interest. Except as otherwise indicated, the definitions of said act and regulations adopted pursuant thereto are incorporated herein, and this code shall be interpreted in a manner consistent therewith. (Ord. No. 77-46, § 2, 9-6-77)

Costa Mesa Municipal Code § 2-408. Definition of terms.

Except as otherwise provided, the definitions contained in the Political Reform Act of 1974 (Government Code section 81000, et seq.), the regulations of the fair political practices commission, and any amendments to the act or regulations, shall be incorporated into this conflict of interest code. (Ord. No. 77-46, § 2, 9-6-77)

Costa Mesa Municipal Code § 1-33. Violations, penalties and enforcement.

The city council of the City of Costa Mesa intends to secure compliance with the provisions of this Code. To the extent that such compliance may be achieved by less drastic methods of enforcement the following alternate, separate and distinct methods may be utilized. Each

method set forth herein is intended to be mutually exclusive and does not prevent concurrent or consecutive, methods being used to achieve compliance against continuing violations. Each and every day any such violations exist constitutes a separate offense.

Notwithstanding any other provision of this Code, each violation of the provisions of this Code may be enforced alternatively as follows:

(a) Infraction. any person violating any of the provisions or failing to comply with any of the mandatory requirements of this Code may be prosecuted for an infraction. Written citations for infractions may be issued by police officers or designated nonsafety employees, who shall be designated by separate resolution pursuant to the provisions of California Penal Code Section 836.5. Any person convicted of an infraction under the provisions of this Code shall be punishable either by fines as is specified in the currently adopted Uniform Infraction Bail Schedule used by the Orange County Municipal Courts, or where no fine is specified therein by:

(1) A fine not exceeding one hundred dollars ($100.00) for a first violation;

(2) A fine not exceeding two hundred dollars ($200.00) for a second violation of the same ordinance within one year;

(3) A fine not exceeding five hundred dollars ($500.00) for each additional violation of the same ordinance within one year.

(b) Misdemeanor. Any person violating any of the provisions or failing to comply with any of the mandatory requirements of this Code may be prosecuted for a misdemeanor. Written citations for misdemeanors may be issued by police officers or by designated nonsafety employees, who shall be designated by separate resolution pursuant to the provisions of California Penal Code Section 836.5. Any person convicted of a misdemeanor under the provisions of this Code shall be punished by a fine not exceeding one thousand dollars ($1,000.00) or imprisonment for a term not exceeding six (6) months, or by both such fine and imprisonment.

(c) Civil action. The city attorney, by and at the request of the city council, may institute an action in any court of competent jurisdiction to restrain, enjoin or abate the condition(s) found to be in violation of the provisions of this Code, as provided by law.

(d) Administrative hearing. Upon a finding by the city official invested with the authority to enforce the various provisions of this Code that a violation exists, he may notify the owner(s), occupant(s) or person(s) deemed responsible for said violation(s) that a public hearing shall be held before the city council to hear and determine the existence of said violation(s) and the anticipated compliance necessary, i.e. abatement or other action required.

Said notification shall be in writing setting forth the alleged violation(s) and the anticipated action sought, and shall be given not later than ten (10) days prior to the scheduled date of the hearing. Said hearing shall be conducted in accordance with the city council's rules for the conduct of an administrative hearing. The decision of said hearing shall be enforceable as provided by law. (Code 1960, § 1115; Ord. No. 79-3, § 2, 4-2-99; Ord. No. 85-26, § 2, 10-21-85)